Supreme Court, U.S.
FILED

97-79 JUL 11 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court Of The United States

October Term, 1996

IN THE INTEREST OF: THE CHILDREN FOR WHOM SANDRA OVERCASH IS GUARDIAN AD LITEM

Petitioner

v.

MR. DOE AND MRS. DOE

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI (WITH ATTACHED APPENDICES)

On the Petition:
HELEN L. MCGONIGLE
Attorney at Law
P.O. Box 326
Brookfield, CT 06804-0326
(203) 740-0074

Counsel of Record:
SYLVIA LYNN GILLOTTE
Office of the Governor-
Guardian Ad Litem Division
103 S. Pine St., Suite 204
Spartanburg, SC 29302
(864) 542-1861

JULY 1997

43 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Equal Protection and Due Process Clauses of the 14th Amendment Prohibit Appellate Courts From Remanding Protective Custody Cases on the Basis of "Staleness" Because Time Has Elapsed While the Cases Are on Appeal, Thereby Avoiding Meaningful Appellate Review?

II. Whether Minor Children in Protective Custody Cases Are Constitutionally Entitled to Meaningful Appellate Review of a Judicial Bias Claim Under the Equal Protection and Due Process Clauses of the 14th Amendment?

PARTIES TO THE PROCEEDINGS BELOW

1. Horry County Department of Social Services, Plaintiff in the Family Court;

2. Mr. Doe, Defendant-Respondent;

3. Mrs. Doe, Defendant-Respondent;

4. Sandra Overcash, In the Interests of the Children, Guardian ad Litem, Petitioner

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION . . . 13

I. Certiorari Should Be Granted to Decide Whether the Equal Protection and Due Process Clauses of the 14th Amendment Prohibit Appellate Courts From Remanding Protective Custody Cases on The Basis of Staleness Simply Because Time Has Elapsed While on Appeal 13

II. Certiorari Should Be Granted To Decide Whether Children in Protective Custody Cases Are Constitutionally Entitled to Meaningful Appellate Review of a Judicial Bias Claim Under the Equal Protection and Due Process Clauses of the 14th Amendment 21

CONCLUSION 30

APPENDIX

Order Granting the Petition for Writ of Certiorari filed October 7, 1996 In the South Carolina Supreme Court 1A

Memorandum Opinion No. 97-M-019 of The State of South Carolina Supreme Court filed March 24, 1997 . . . . . 2A-3A

Order of The Supreme Court of South Carolina denying Petition for Rehearing filed April 17, 1997 . . . . . 4A-5A

Unpublished Opinion of The State of South Carolina in The Court of Appeals O.p. No. 96-UP-022 filed January 23, 1996 . . . . . 6A-8A

Emergency Custody Order in the Family Court of the Fifteenth Judicial Circuit Filed November 23, 1992 . . . . . 9A-12A

Temporary Order (Not Ending Action) In the Family Court of the Fifteenth Judicial Circuit Filed August 4, 1993 . . . . . 13A-17A

Final Order (Ending Action) In The Family Court of the Fifteenth Judicial Circuit filed January 4, 1994 . . . . . 18A-24A

Order on Motion to Reconsider, Alter and Amend Decree filed March 1, 1994 . . . . . 25A-28A

Excerpts of Testimony of Sarah Shuh, M.D.
Qualified Expert in Pediatrics and Evaluation
of Child Sexual Abuse 29A-41A

TABLE OF AUTHORITIES

Federal Cases:

Anderson v Bessermer City, 470 U.S. 564 (1985) 13, 16

Aetna Life Insurance Co. v Lavoie,
475 U.S. 813 (1986) 22

Bowman Transp. v Arkansas-Best Freight
System, 419 U.S. 281 (1974) 14, 16

Brown v Mississippi, 297 U.S. 278 (1936) 20

Cruzan v Director, MDH,
497 U.S. 261 (1990) 18

De Shaney vs Winnebago Cty.
Soc. Servs. Dept., 489 U.S. (1989) 24, 25

Estes v Texas, 381 U.S. 532 (1965) 22

Foucha v Louisiana, 504 U.S. 71 (1992) 18

Griffin v Illinois, 351 U.S. 12 (1956) 20

ICC v. Jersey City, 322 U.S. 503 (1944) 14, 16

Illinois v Allen, 397 U.S. 337 (1970) 14

In re Gault, 387 U.S. 1 (1967) 17, 21

In re Winship, 397 U.S. 358 (1970) 20

In re Oliver, 333 U.S. 257 (1948) 20

In re Murchison, 349 U.S. 133 (1955) 10, 22

Johnson v Mississippi, 403 U.S. 212 (1971) 10

Mathews v Eldridge, 424 U.S. 319 (1976) 14, 19

M.L.B. v S.L.J., U.S. , 5,
117 S. Ct. 555 (1997) 20

Nebraska Press Assn. v Stuart,
427 U.S. 539 (1976) 22

Palmore v Sidoti, 466 U.S. 429 (1984) 17, 18

Pennsylvania v Ritchie,
480 U.S. 39 (1987) 26

Reno v Flores, 507 U.S. 292 (1993) 18, 20
..... 21

Schall v Martin, 467 U.S. 253 (1984) 18

Shelley v Kraemer, 334 U.S. 1 (1948) 17

Santosky v Kramer, 455 U.S. 745 (1982) 11,16,
..... 18, 19

Trimble v Gordon, 430 U.S. 762 (1977) 18

Tumey v Ohio, 273 U.S. 510 (1927) 20

United States v Lanier, U.S. ,
65 U.S.L.W. 3814,
1997 U.S. Lexis 3658 (1997) 24

United Transportation Union v Michigan
Bar, 401 U.S. 576 (1971) 14

Ward v Village of Monroeville,
409 U.S. 57 (1972) 24

Weiss v United States, 510 U.S. 163 (1994) 22

Wilson v Wilson,
742 F.2d 1004 (6th Cir. 1984) 19

State Cases:

Cook v Cook, 311 S.E.2d 90
(S.C. Ct. App. 1984) 15

Doe v Hoult, 418 S.E. 2d 511
(N.C. 1992) 19

Dorn v Criddle, 410 S.E.2d 590
(S.C. Ct. App. 1991) 15

Edel v Edel, 293 N.W2d 792
(Mich. App. 1980) 16

Georgetown County Dept. of Social Services v Phipps,
292 S. E. 2d 184 (S.C. 1982) 15

Henderson v Woolley, 644 A.2d 1303
(Conn. App. 1994) 19

Holschuh v Holland-Moritz,
292 A.2d 380 (Pa.1972) 15

Hurst v Capitell, 539 So.2d 264
(Ala. 1989) 19

In re Kimberly, 609 N.E.2d 73 (Mass. 1993) 16

Madson v Madson, 313 N.W.2d 42
(S.D. 1981) 15

O'Shields v. O'Shields, 193 S.E.2d 523
(S.C. 1972) 15

Spartanburg County DSS v Powell,
S. C. Court of Appeals
Op. No. 90-MO-003 15

West Virginia Department of Human Services v La Rea Ann C. L., 332 S.E. 2d 632 (W. Va. 1985) 16

Constitutional Provisions:

U.S. Const. amend XIV ..... *in passim*

Miscellaneous:

C. Gill, *Children's Interests, Trial, p. 10 (ATLA June 1997)* 17

B. Marin, et al, *The Potential of Children as Eyewitnesses: A. Comparison of Children and Adults in Eyewitness Tasks*, 3 Law and Human Behavior 295 (1979) 28

B. Nurcombe, *The Child as Witness: Competency and Credibility*, 25 J. Am. Acad. of Child Psychiatry 475 (1986) 28

G. Melton, *Children's Competency to Testify*, 5 Law and Hum. Behav., 75 (1981) 28

Hayes, et al, *Child's Word, ABC News Nightline*, November 14, 1996, Transcript #4039-1 25

J. Landwirth, *Children as Witnesses in Child Sexual Abuse Trials*, 3 L. Guardian Rptr. (Issue IV 1987) 28

J. Myers, *Evidence in Child Abuse and Neglect Cases*, (Wiley 1987) 29

J. Meyers, *The Backlash: Child Protection Under Fire*. (Sage Publications, Inc. 1994) 25

U.S. Department of Health and Human Services, Child Maltreatment 1995: Report from the States of The National Child Abuse and Neglect Data System (Washington D.C.: U.S. Gov't Printing Office 1997) 17, 27

U.S. Dept. Of Health and Human Services, Child Maltreatment 1994: Reports from the States to the National Center on Child Abuse and Neglect (Washington D.C.: U.S. Gov't Printing Office 1996) 27

Victim Costs and Consequences A New Look, 1996. Bureau of Justice Statistics, U.S. Dept. of Justice NCJ-155282 27

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

IN THE INTERESTS OF THE CHILDREN: FOR WHOM SANDRA OVERCASH IS GUARDIAN AD LITEM,
Petitioner

vs

MR. DOE AND MRS. DOE, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF SOUTH CAROLINA SUPREME COURT

The Petitioner, Sandra Overcash, the Guardian ad Litem for the three minor children in interest, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of South Carolina in *Doe vs Doe*, case no. 92-DR-26-3244 (*see* Petitioner's Appendix at 2A-3A, hereinafter "App. ___").

OPINIONS BELOW

On March 24, 1997, after granting this Petitioner's petition for writ of certiorari (App. 1A) and entertaining oral argument, the Supreme Court for the State of South Carolina issued its unreported opinion dismissing the Petitioner's petition for writ of certiorari as improvidently granted. The opinion of the South Carolina Supreme Court is reproduced at App. 2A-3A. The South Carolina Supreme Court's denial of this Petitioner's petition for rehearing dated April 17, 1997 is reproduced at App. 4A.

The unpublished opinion of the Court of Appeals for the State of South Carolina affirming the appeal of the Petitioner in part, reversing in part, and remanding the case to the Family Court is reproduced at App. 6A-8A.

STATEMENT OF JURISDICTION

The South Carolina Supreme Court entered judgment of dismissal on March 24, 1997. On April 17, 1997, it denied this Petitioner's petition for rehearing. In accordance with Supreme Court Rule 13(3), the time for filing this petition for writ of certiorari runs from denial of the petition for rehearing, expiring July 16, 1997.

Petitioner invokes the certiorari jurisdiction of this Court pursuant to 28 U.S.C.§1257(a) and Supreme Court Rules 10 (b) and (c).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV: Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This petition filed by Sandra Overcash, as guardian ad litem for the children, concerns the welfare of all children in our society and the constitutional rights of children to due process and equal protection under the Fourteenth Amendment in the review of protective cases involving allegations of physical abuse, sexual abuse, neglect and mental injury.

The South Carolina Supreme Court, although initially agreeing to review this case, dismissed the minor children's petition for certiorari as improvidently granted. The South Carolina Supreme Court considered the record "stale" since three years had elapsed from the time of trial and while the case was on appeal. The South Carolina Supreme Court, implicitly rejected the petitioner's claims, both briefed and argued, that the Court of Appeals should have found bias by the Family Court, and that such judicial bias resulted in a violation of the children's constitutional rights to due process and equal protection under the Fourteenth Amendment.

This case was initiated in the Family Court on the complaint of the Horry County Department of Social Services ("DSS"), filed pursuant to Section 20-7-610 of the Code of Laws of South Carolina (1976). The Family Court of the Fifteenth Judicial Circuit entered an ex parte order on November 23, 1992 granting emergency protective custody, and temporary care and control of three minor children, James Herring, Savannah Herring and Teresa Herring to the DSS. At the time, the children were residing with their natural parents, the respondents Dan Herring and Laura Herring. This complaint was at least the third instance where the Herrings came to the attention of child protective services. R. 804-813.

The Family Court (Murdock, J.) found probable cause to believe that "by reason of abuse/neglect, there exists an imminent danger to the said child(ren)'s life or physical safety in the following particulars:

> On 11-19-92, DSS received information that James Herring stated he had been having oral sex with his father. James also

stated that his mother would put tape on his mouth while she did "funny" things to his dad. James was observed being made to kiss his two younger sisters, 4 and 3 years of age, in the mouth by his father. James was also made to kiss his father on the mouth and there was a licking that occurred between the two. DSS feels that the allegations made by 6 year old James requires the three minor children to be placed in the custody of the plaintiff for their protection from further abuse." App 10A.

The children were placed in foster care and their parents were granted two weekly supervised visitations. On motion of the Guardian ad Litem, the Family Court (Hearn, J.) determined that the parental visitations "may be impairing the Plaintiff's ability to emotionally stabilize the minor children" and curtailed the supervised visitations to every other week. App. 15A-16A.

A hearing on the merits was held on August 4, 5 and December 7, 1993 before Family Court Judge H.E. Bonnoitt, Jr. At the time of trial, the children's ages were as follows: James, age 6; Savannah, age 5; and Teresa, almost 4. All three children were qualified by the Court as competent to testify. Each of the children testified at trial to numerous incidents of physical and sexual abuse.

The eldest, James Herring, testified that his father "punches me in my private parts." James also identified a drawing made by him while institutionalized at the Medical University of South Carolina "of my daddy touching me in my private part", which was admitted into evidence. R. pp. 151-152. The young boy also described various incidents of physical abuse: that his father hit him in the face with a switch; kicked him; hit him with a tennis racket; sealed his mouth with duct tape and tied him to a chair with ropes. R. pp. 136, 137, 138, 140, 141, 149-150. On cross-examination, James testified that his father stuck a needle in his "private parts" on more than one occasion. R. p. 169.

Savannah Herring testified that her parents "were messing with the body parts" and indicated on an anatomically correct doll "down here," "sometimes I call it private place" or "tutu." She further indicated that both of her parents touched and rubbed her

"tutu"; her father "pee-peed in her mouth" and she afterwards spit a yellow substance "in the toilet." R. pp. 105; 109; 124. The Family Court, however, ignored Savannah's testimony that she had been rubbed and touched in her "tutu." App. 20A.

The youngest child, Teresa Herring, testified that they "pulled my pants down and then done it," later indicating that her father, with no clothes on and his underwear pulled down, took her pants off and "put his finger in there and then he touched me back here -[h]iney. He put his finger right there." R. p. 72. Teresa further testified that "mama started wanting to touch my tutti and daddy was sitting there watching mama." R. p. 68; 72.

Testimony corroborative of the children's physical abuse, sexual abuse, neglect, and mental injury was provided at trial by the children's foster parents, various caseworkers and therapists, the parents' evaluating psychologist[1], and by the children's Guardian ad Litem.

The children's testimony of physical and sexual abuse was further corroborated by the testimony of Sarah Elizabeth Shuh, M.D., a licensed medical doctor (since 1969), board certified in pediatrics. App. 31A. Dr. Shuh was qualified by the Family Court "as an expert in pediatrics and evaluation of sexually abused children" App. 32A. Her examination of both girls on January 15, 1993 yielded abnormal physical findings. App. 32A; 34A-36A. During her vaginal examination of Savannah Herrring, Dr. Shuh observed a "small notch representing an old scar in the interior

---

1. Both parents were diagnosed with personality disorders by Kay McNeill, Ph.D., a licensed clinical psychologist. Dan Herring, age 34, unemployed and applying for a disability determination, was diagnosed with Dependent Personality Disorder with Avoidant and Passive Aggressive Features and Adjustment Disorder with Anxious Mood vs Specific Anxiety Disorder. Laura Herring, age 26 at the time of the evaluation, was diagnosed with Dependent-Compulsive Personality Disorder.

The Herrings had come to the attention of child protective services while in Texas and elsewhere in South Carolina prior to the instant action. R. 804-813.

portion of the hymen; a small scar external and posterior to the vaginal opening". App. 36A; 35A. During the rectal exam, Savannah indicated to Dr. Shuh she had "been hurt there before." App. 35A. Dr. Shuh noted a small triangular tag scar more external to the anal opening adjacent to a paler scar which extended into the anal canal which indicated trauma. *Id.* Dr. Shuh opined: that the hymenal scar was consistent with penetration of the hymenal opening into the vaginal canal; the scar "external to the vaginal opening but in the genitalia is compatible with an injury to the superficial tissues which could have been caused by sexual abuse"; and the scar in the anal canal was also compatible with penetration. Dr. Shuh testified on cross-examination that it was not "plausible" that Savannah's rectal scarring could be caused by the administering of Fleet enemas to relieve constipation. App. 39A. Dr. Shuh also testified that urinary tract infections "could not explain the hymenal scar." App. 39A-40A.

Dr. Shuh's examination of Teresa revealed a small posterior lateral scar in the anal canal which was "consistent with sexual abuse," corroborating both Teresa's testimony that her father had placed a finger in her "hiney," and her statement made to Dr. Shuh of object penetration. App. 36A-37A. Dr. Shuh also testified that many forms of sexual abuse leave no physical findings such as fondling, oral sex, vaginal finger penetration, and rectal penetration with the use of lubricants. App. 37A-38A.

At trial, the DSS presented testimony that at the time of the initial investigative worker's visit to the respondents' home, the two young girls were found to be very dirty, wearing inappropriate clothing for the season and without shoes. R. pp. 233; 814-815. There were no drawers for clothes in the children's rooms, no clothes in their closets, and the mattresses on the children's beds were soiled and had no sheets. R. pp. 231; 232.

At trial testimony was presented through the children's parents, foster parents and other witnesses of the severe behavioral problems exhibited by all three children. James Herrings behavioral problems were so severe that he was under the care of doctors at the Medical University in Charlestown at the time of his removal from the parental home. James was physically aggressive, urinating on

the carpet, in the closet, in the bathtub, defecating in the bathtub, smearing feces on his sisters and was physically aggressive with other children at school. R. pp. 375; 379; 380.

Savannah acted out sexually, masturbated repeatedly, and had a severe problem with wetting her pants and bed. R. pp. 271; 272; 276; 388; and 505. According to her aunt, she would wet her pants up to seven times a day. R. p. 615. She also began wetting the floor and defecating in the bathtub following parental visitations. R. pp. 388; 727; 728. Theresa Clardy, the children's therapeutic foster parent, testified that Savannah "would rub herself with her hands. She would take her panties off and she would put her hands on her private areas and rub herself." R. p. 248. Savannah's response to corrective action was "Mommy and Daddy do it and make me do it." R. p. 249.

Like Savannah, Teresa acted out sexually, rubbing herself in her vaginal area, pressing herself up against doorknobs and dresser drawers. R. p. 253. Teresa also experienced wetting problems related to visits with her parents. R. p. 254.

Under the care of a therapeutic foster parent, all three children expressed fear of being bathed and would cry such things as "are you going to hurt me," "what are you going to do," "are you going to hurt my ding dong." R. pp. 261; 263.

Janice Pepper, who was found by the court to be an expert in the fields of clinical psychology and counseling, and Amanda Hendrick, the DSS caseworker, both testified that such sexualized behavior, bedwetting, hyperactivity and aggressive play are all considered indicators of abuse. R. p. 318; 773.

The parents presented no expert testimony contradicting the physical and behavioral evidence supporting the DSS's complaint. Despite the physical and other evidence substantiating the DSS's complaint, the Family Court (Bonnoitt, J.) found insufficient evidence of physical or sexual abuse, dismissed the DSS complaint, and ordered the children returned to their natural parents. No factual findings were made by the Family Court on the allegations of neglect and mental injury.

The Family Court in its findings of fact remarked: "[t]his court must be cognizant of the inherent unreliability of *evidence presented of children* this age and of their susceptibility to acquiring matters from their environment and encoding such matters to their experience." App. 22A. Both the DSS and the Guardian Ad Litem filed Motions to Reconsider, Alter, and Amend the Family Court's decree. On March 1, 1994, the Family Court affirmed its earlier order, amended certain findings of fact, and included the following statement in its order: "[t]he most troubling question in this case involves the objectivity of many of those who involve themselves in the child sexual abuse industry." App. 28A. Although there was no expert testimony offered on the suggestibility of children or memory, the court nevertheless altered its earlier statement from the "evidence presented of children of this age", to "memory evidence presented by children." App. 26A.

The petitioner filed an appeal with the Court of Appeals for the State of South Carolina on March 11, 1994, contesting the Family Court's Final Order and the Order on Motions to Reconsider, Alter, and Amend Decree. The Petitioner expressly raised the federal constitutional issue of the children's right to a hearing before a neutral, unbiased judge under the due process and equal protection clauses of the 14th Amendment. This petitioner dedicated eight pages of its brief to the following issue: "the lower court's decisions should be reversed because the trial judge violated the children's constitutional rights to due process and equal protection."

The petitioner specifically challenged the Family Court's unreasonable classification of the testimony of children of three to six years of age on constitutional grounds. The equal protection arguments was expressly raised in the Court of Appeals: "[i]n creating an unreasonable classification based entirely upon age, he [Family Court Judge Bonnoitt] violated the children's right to equal protection under the law. U.S.C.A. Const. Amend. 14." (Petitioner's brief on the Court of Appeals, pp. 39-40).

The petitioner raised the due process issue in the Court of Appeals as follows:

> "in addition to his comments concerning the inherent unreliability of children and their memory evidence, the trial judge's scathing comment about the lack of 'objectivity of the sex abuse industry' demonstrates bias unsupported by the record. Such bias and closed-mindedness regarding sexual abuse of young children resulted in a denial of due process in that the children's cause was not heard by an impartial judge.... The United States Supreme Court has consistently held that litigants are entitled to a hearing before a fair and impartial judge. See, e.g., *Johnson vs Mississippi*, 403 U.S. 212, 217 (1971) [trial before an unbiased judge is essential to due process]; *In re Murchison*, 349 U.S. 133, 136 (1955) [a fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases . . .].The amended Findings of Fact clearly demonstrate that the Herring children were not afforded due process given the trial judge's clear prejudice against their testimony and the testimony of those who appeared on their behalf"(Petitioner's brief in Court of Appeals, pp. 41-42).

The Court of Appeals filed its unpublished opinion on January 23, 1996, affirming in part, reversing in part, and remanding the decision to the very same Family Court judge for further findings on the issues of neglect and mental injury (not physical and sexual abuse) and a de novo hearing. App. 8A. The Court of Appeals expressly acknowledged that, "the record reflects much evidence supporting physical and sexual abuse had the Family Court made such a finding", yet it found no abuse of discretion warranting reversal on the issues of physical and sexual abuse. App. 7A.

Although the Court of Appeals was "concerned about evidence at trial indicating the children had inadequate clothing, poor hygiene, and irregular medical care, as well as disturbing familiarity with sexual matters beyond their years", it nonetheless remanded the case to Family Court for further proceedings on the

issues of neglect and mental injury requiring a de novo hearing of the conditions of the home at the time of remand App. 8A. The Court of Appeals implicitly rejected the Petitioner's due process and equal protection arguments.

The Guardian ad Litem, following a denial of her Petition for Rehearing in the Court of Appeals, successfully petitioned for writ of certiorari to the South Carolina Supreme Court arguing: "the court of appeals should have found bias by the lower court which was clearly evidenced in the record, and which resulted in a violation of the minor children's constitutional rights to due process and equal protection." After briefing and entertaining oral argument, in a memorandum opinion filed March 24, 1997, the South Carolina Supreme Court dismissed[2] the Guardian ad Litem's petition as improvidently granted. The court stated in its opinion that "[w]hile we are concerned about the disturbing evidence presented at trial, the record is insufficient to allow us to make a finding of what is in the best interests of the children, especially since the trial transcript is over three (3) years old. We agree with the Court of Appeals that remand is required." The South Carolina Supreme Court ordered that the matter be disposed of in 90 days in view of the "staleness of the record and the considerable passage of time." App. 3A. The family court judge, to date, has conducted no such hearing. The 90 days is scheduled to expire July 16, 1997.

The Guardian ad Litem's petition for rehearing dated April 8, 1997, first raised and briefed the following federal issues:

> The Court erred in refusing to make a finding of what is in the best interests of the children on the premise that the trial transcript is over three years old, in that:
>
> a) A child's right to be free from harm is a protected liberty interest under the Fourteenth Amendment to the U.S. Constitution, and the state's duty to protect children from

---

2 Notably this court granted certiorari to review a constitutional challenge following dismissal of the petitioners' appeal to the New York Court of Appeals in *Santosky v Kramer*, 455 U.S. 745, 752 (1982), cert. granted 450 U.S. 993 (1983).

such harm and grant custody based upon their best interests has been deemed a governmental interest for the purpose of the Equal Protection Clause, necessitating that this Court affirmatively address the issues of bias and impartiality prior to remanding this matter back to the trial judge for further determination.

b) All transcripts in appeals involving the custody and best interests of children could be considered "stale" to the extent that children's lives will necessarily change and be impacted by their placement as the appellate process progresses.

c) The issues on appeal in this case deal with the sufficiency of the evidence at the times of trial, plain error in the lower court's decision, and apparent bias and partiality on the part of the trial judge, all of which can be determined by a proper review of the trial transcript.

d) Although the Court of Appeals expressed concern about the minor children's "disturbing familiarity with sexual matters beyond their years," and found that the evidence at trial was sufficient to have supported findings of physical and sexual abuse had the trial court done so, its refusal to find abuse of discretion on the part of the trial judge amounted to a failure of the Court of Appeals to protect the best interests of the children.

e) Inasmuch as a remand of the case on the issues of neglect and mental injury do not address improper findings as to physical and sexual abuse, it is in the best interests of the minor children that this Court correct such findings in its own review of the record, especially in view of the fact that this court has expressed concern "about the disturbing evidence presented at trial," and felt compelled "to remind the trial judge and the parties that the best interest of the children is of paramount importance."

f) While "the best interests of the children" may or may not warrant immediate removal of the children from the

> home at this time, it is clearly in the best interests of the children that proper findings be made of any prior abuse which was substantially documented by evidence presented at the initial trial of this matter, and that immediate services be provided to the children and family.

The South Carolina Supreme Court denied this Petitioner's petition for rehearing on April 17, 1997, implicitly rejecting the aforementioned federal constitutional issues. App. 4A.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT PROHIBIT APPELLATE COURTS FROM REMANDING PROTECTIVE CUSTODY CASES ON THE BASIS OF STALENESS SIMPLY BECAUSE TIME HAS ELAPSED WHILE THE CASES ARE ON APPEAL

The South Carolina Supreme Court refused to undertake any meaningful analysis of the record before it. Instead it dismissed the petitioner's petition for writ of certiorari after granting certiorari, briefing, and entertaining oral argument because three years had elapsed since the time of trial while the case was on appeal. App. 1-3A. In protective child custody cases where physical abuse, sexual abuse, neglect and mental injury are alleged, there is all the more need for meaningful appellate review of the record. A refusal to review creates the risk that children will be exposed to further harm and suffer the severe consequences of continued heinous abuse. Condoning remand without review on the record conflicts with decisions of this Court and sets a dangerous precedent.

This Court has made clear that controversies and factual issues are to be decided on the ***present record*** before the court. *Anderson v Bessermer City,* 470 U.S. 564, 577 (1985). This Court has on a number of occasions expressed unwillingness to remand cases for further proceedings due to the elapse of time:

> We appreciate the difficulties that arise when the lapse between hearing and ultimate decision is so long. Undoubtedly economic changes dated the 1966 studies that the parties, both applicants and appellees, had placed in the record. Nevertheless, we have always been loath to require that fact finding begin anew merely because of delay in proceedings of such magnitude and complexity. To repeat what was said in *ICC v. Jersey City*, 322 U.S. 503, 514-515 (1944): "Administrative consideration of evidence – particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it – always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." *Bowman Transp. v Arkansas-Best Freight System*, 419 U.S. 281, 294-295 (1974).

The majority of this Court in *Illinois v Allen*, 397 U.S. 337 (1970) had based its decision on review of a record that was thirteen years old! Noting that the majority was undeterred by the age of the case, Justice Douglas in his concurrence noted, "[t[his is a stale case, the trial having taken place nearly thirteen years ago." *Id.* at 351. A year later in *United Transportation Union v Michigan Bar*, 401 U.S. 576 (1971), the majority of this Court also rested its decision on a record the dissent characterized as "stale." *Id.* at 595.

The result should be no different in protective child custody cases. The parties are entitled to accurate and meaningful appellate review of their claims on the record before the court. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v Eldridge*, 424 U.S. 319, 333 (1976).

This case is not the first instance where the South Carolina Supreme Court and the Court of Appeals avoided appellate review based on "staleness" when the interests of children are at stake. See, *Georgetown County Dept. of Social Services v Phipps*, 292 S. E. 2d 184 (S.C. 1982). In *Georgetown County Dept. Of Social Services*, the DSS sought custody of two minor children. The trial court granted custody to the paternal grandparents, and on appeal, the South Carolina Supreme Court remanded for a trial de novo because "considerable time has elapsed since custody was granted and the record has become stale." *Id. at* 185. As in the instant case, three years elapsed from the time of trial and while the case was on appeal to the Court of Appeals and the Supreme Court.

The South Carolina Supreme Court in a parental custody case decided ten years before *Georgetown County DSS* correctly entertained the appeal on its merits and affirmed the lower court's ruling awarding custody to the child's mother, even though it considered the record "lamentably stale." *O'Shields v. O'Shields*, 193 S.E.2d 523 (S.C. 1972). The instant case and *Georgetown County Dept. of Social Services v Phipp* represent the more recent trend in protective custody cases followed by the South Carolina Supreme Court over the past 15 years. The frequency of this trend is hard to measure given that many appellate opinions involving protective custody cases, as in the instant case, are unpublished.

The Court of Appeals has also followed the lead of the state Supreme Court, remanding child custody cases on the basis of "staleness in both *Dorn v Criddle*, 410 S.E.2d 590, 592 (S.C. Ct. App. 1991) and *Cook v Cook*, 311 S.E.2d 90, 91 (S.C. Ct. App. 1984). In *Dorn v Criddle, supra at 592*, the Court of Appeals noted: [w]e, however, recognize that more than three years have elapsed since the trial court issued the appealed order partly because the original appeal was delayed for numerous reasons and partly because this Court granted a rehearing of a previously published decision in this case." In an unpublished decision in *Spartanburg County DSS v Powell*, Op. No. 90-MO-003 (Jan. 2, 1990), citing *Cook v Cook*, the Court of Appeals also remanded a protective custody case based on staleness instead of deciding the appeal.

The Supreme Court of South Dakota has also remanded child custody cases on the grounds that it considered the record stale. *Madson v Madson*, 313 N.W.2d 42, 44 (S.D. 1981), *citing Edel v Edel*, 293 N.W2d 792 (Mich. App. 1980). Similarly, the Supreme Court of Pennsylvania has also avoided meaningful appellate review of custody cases due to the lapse of time as the case "winds its way through the appellate process." See, *Holschuh v Holland-Moritz*, 292 A.2d 380, 385 (Pa. 1972). The Supreme Court of Appeals of West Virginia also remanded a child custody case because it believed "the appropriate procedure is to remand for development of a record on the existing state of facts, rather than making a decision on a 'stale' record." *West Virginia Department of Human Services v La Rea Ann C.L.*, 332 S.E. 2d 632, 636 (W. Va. 1985).

In direct conflict with the line of cases referenced above, the highest court of the state of Massachusetts, in *In re Kimberly*, 609 N.E. 2d 73, 75 (Mass. 1993), affirmed the termination of a mother's parental rights because of the sexual, physical and emotional abuse of her minor child; flatly rejecting the mother's claim that circumstances had changed and the evidence had become stale.

The practice of remanding child custody cases due to the passage of time should not be condoned and is in direct conflict with the holdings of this Court in *Anderson v Bessermer City*, 470 U.S. 564, 577 (1985); *Bowman Transp. v Arkansas-Best Freight System*, 419 U.S. 281, 294-295 (1974); and *ICC v. Jersey City*, 322 U.S. 503, 514-515 (1944).

Review of the propriety of remanding custody cases on the basis of staleness is an issue of paramount importance when the welfare of children is at stake. There is an enormous risk of returning children to abusive homes where they are endangered, leaving the issues of abuse on the record before the court unreviewable. Significantly, this Court granted certiorari on a record over three years old in a protective custody case to review the due process claims of the parents. *Santosky v Kramer*, 455 U.S. 745 (1982). The Petitioner respectfully requests this Court to grant certiorari to review the constitutional claims of children.

In custody cases where physical abuse, sexual abuse, neglect and mental injury are alleged, there is all the more need for meaningful review of the record by appellate courts. An application of the law to the facts as they existed at the time of trial is absolutely necessary so that a legal history on the family is accurately created. In 1995 alone, forty-five states reported that 996 children were known by child protective agencies ("CPS") to have died as a result of abuse or neglect. *U.S. Department of Health and Human Services, Child Maltreatment 1995: Report from the States of The National Child Abuse and Neglect Data System (Washington D.C.: U.S. Gov't Printing Office 1997).* Investigations by CPS agencies in 45 states determined that over one million children were victims of substantiated or indicated child abuse and neglect in 1995. Approximately 52% of the victims were female and 47% were male. *Id.*

Protective custody cases should not be singled out for disparate treatment by the appellate system. The South Carolina Supreme Court, and high courts in other states, have engaged in arbitrary and discriminatory classification of cases involving the interests of children. The South Carolina Supreme Court's decision to remand the case to the same biased Family Court judge because it considered the record "stale," is a state action governed by the Fourteenth Amendment, *Palmore v Sidoti*, 466 U.S. 429 (1984) citing *Shelley v Kraemer*, 334 U.S. 1 (1948).

While the word "child" is noticeably absent from the U.S. Constitution, the 14th Amendment due process and equal protection clauses expressly extend to "any person," regardless of age[3]. Since at least the landmark case of *In re Gault*, 387 U.S. 1 (1967), this Court has expressly recognized that the Constitution applies to children.

---

3. By comparison with other nations, the United States is not a leader in protecting the rights of children. Some 80 other nations affirmatively protect children by name in their constitutions. In addition, 190 member nations have ratified the U.N. Convention on the Rights of Children. Only two member nations have not - Somalia and the United States. Gill, *Children's Interests, Trial, p. 10 (ATLA June 1997).*

This Court has also recognized the substantial governmental interest in granting custody based on the "best interests of the child" under the Fourteenth Amendment's equal protection clause. *Palmore, supra.* In *Palmore*, this court held "[t]he State of course has the highest order to protect the interests of minor children, particularly those of tender years." *Id.* at 433. "The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." *Id.* This court has also held that illegitimate children cannot be denied equal protection of the law. *Trimble v Gordon*, 430 U.S. 762 (1977) (holding unconstitutional an intestacy statute that permitted children born out of wedlock to inherit only from their mother).

The government, in this instance the state of South Carolina, in the exercise of its parens patriae authority, has a governmental interest in "preserving and promoting the welfare of the child," *Santosky v Kramer*, 455 U.S. 745, 766 (1982). "Minimum standards must be met, and the child's fundamental rights must not be impaired". *Reno v Flores*, 507 U.S. 292 (1993). Justices O'Connor and Souter concurrence in *Reno* stated: "[s]pecifically, the absence of available parents, close relatives, or legal guardians to care for respondents (a class of alien juveniles) does not vitiate their constitutional interest in freedom from institutional confinement. It does not place that interest outside the core of the Due Process Clause." *Reno, supra* at 319 (concurring).

As a matter of substantive due process, children have a liberty interest in not being physically abused, sexually violated, or subjected to mental injury and neglect. This court has recognized the fundamental due process liberty interests of an individual to bodily integrity and personal autonomy. *Foucha v Louisiana*, 504 U.S. 71, 80 (1992). Freedom from bodily restraint by arbitrary government action has always been at the core of the liberty protected by the Due Process Clause. *Id.; also see, Cruzan v Director, MDH*, 497 U.S. 261, 278 (1990). In *Schall v Martin*, 467 U.S. 253 (1984), this Court made clear that children have a constitutionally protected liberty interest.

In recognizing the fundamental liberty interest of natural parents in the care, custody and management of their children, this court has also separately recognized the interests of children apart from their parents. *Santosky v Kramer*, 455 U.S. 745, 753 (1982). After the State has established parental unfitness at an initial fact finding proceeding in a termination of parental rights case, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge. *Id. at 760.* Until the State establishes parental unfitness, the child and parents share a vital interest in preventing erroneous termination of their natural relationship. *Id.*

Parents, children and the states share an interest in accurate and just decisions by courts of law in custody cases where abuse is suspected, regardless of whether the interests of parent and child are aligned or diverge[4]. With these rights having been previously recognized by this Court, certiorari should be granted in this case to decide whether the constitution mandates plenary appellate review of protective child custody cases on the record before appellate courts. The South Carolina Supreme Court's procedures for guaranteeing the fundamental rights of children are dangerously defective if cases can be remanded without meaningful appellate review simply because time elapses while cases are on appeal.

Applying the due process test set forth in *Mathews v Eldridge*, 424 U.S. 319, 335 (1976), as described in *Stantosky, supra* at 754, by balancing: 1) the private interests affected by the proceeding; 2) the risk of error created by the State's chosen procedure; and 3) the countervailing governmental interest supporting the challenged procedure -- yields the conclusion that all parties share an interest in an accurate and just decision. The risk of error has severe consequences with the potential of exposing

---

4 In abrogating the doctrine of parental immunity in child sexual abuse cases, several courts have held, "[f]amilial discord or dysfunction obviously exists where parental sexual abuse occurs. Therefore, the purpose of the preservation of family harmony cannot justify immunity in the case of sexual abuse of a child by a parent". *Henderson v Woolley*, 644 A.2d 1303 (Conn. App. 1994); also see *Hurst v Capitell*, 539 So.2d 264 (Ala. 1989); *Doe v Hoult*, 418 S.E. 2d 511 (N.C. 1992); *Wilson v Wilson*, 742 F.2d 1004, 1005 (6th Cir. 1984).

children to further harm, as compared to the minimal administrative burden of undertaking plenary appellate review of the trial court record. When a party has been deprived of liberty (or property) without the safeguards of common-law procedure, this Court has not hesitated to grant certiorari and to find the proceedings violative of due process. *Tumey v Ohio*, 273 U.S. 510, 511 (1927); *Brown v Mississippi*, 297 U.S. 278 (1936); *In re Oliver*, 333 U.S. 257 (1948); and *In re Winship*, 397 U.S. 358, 361 (1970).

While it is true a state is not required by the Federal Constitution to provide appellate courts a right to appellate review, a state which does grant appellate review must do so in a manner which does not infringes upon an individual's constitutional rights. *M.L.B. v S.L.J.*, 117 S. Ct. 555 (1997) citing *Griffin v Illinois*, 351 U.S. 12, 18 (1956). In the instant case, the South Carolina Supreme Court granted certiorari and should have safeguarded the constitutional rights of the children by deciding the case on the record before it. States which provide appellate review as an integral part of their trial system must abide by the due process and equal protection clauses at all stages of the proceedings. *Id.* Once a state affords the right of appellate review it may not "bolt the door to equal justice." *M.L.B. v S.L.J., Id.* At a minimum, due process requires meaningful appellate review in protective child custody cases in order to protect children from the risk of further harm.

The decision of the South Carolina Supreme Court to remand the instant case because it considered the record stale is in direct conflict with the decisions of this Court as noted above. Nonetheless, the high courts in other states have also followed this dangerous pattern of remanding custody cases on the basis of staleness. The decision to remand because time has elapsed since trial - which happens in every appeal - shields parents in cases of suspected abuse from meaningful appellate scrutiny, leading to potential arbitrary results at the risk of exposing children to further abuse, neglect and mental injury.

The time is ripe to determine whether this procedure is tantamount to a constitutional violation of the equal protection and due process clauses as applied to children in protective custody cases. As Justices O'Connor and Souter remarked in *Reno v*

318 (concurring), "[t]o be sure, government's failure to take custody of a child whose family is unable to care for her may also effect harm. Rather, judicial review ensures that government acts in this sensitive area with the requisite care." *Reno, supra* 318. The South Carolina Supreme Court has demonstrated its failure to act with the requisite care. Departures "from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." *In re Gault, supra* at 18-19.

A conflict exists between the Supreme Court of South Carolina and the high courts of other states, as well as the decisions of this court. Certiorari should be granted to decide this federal question of compelling public importance which impacts the right of children to meaningful appellate review of their claims in protective custody cases nationwide.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER CHILDREN IN PROTECTIVE CUSTODY CASES ARE CONSTITUTIONALLY ENTITLED TO MEANINGFUL APPELLATE REVIEW OF A JUDICIAL BIAS CLAIM UNDER THE 14TH AMENDMENT

Family Court judge Bonnoitt, in addition to making numerous erroneous factual findings clearly refuted by the record, was biased against the children. This was most apparent when the Court expressed its unsubstantiated belief "in the inherent unreliability of evidence presented of children of this age". App. 22A. The Family Court judge, in an effort to cure his obvious error categorically discrediting all evidence presented by young children, later changed the remark regarding "the inherent unreliability of evidence presented of children of this age" to read: "[t]his Court must be cognizant of the memory evidence presented by children of this age and of such children's susceptibility to acquire matters from their environment and the authority figures therein and encoding such matters to their experience." App. 26A. This statement clearly unmasked the bias of the judge. No expert testified on behalf of the respondents regarding the "memory evidence of children" between the ages of three and six.

The Family Court, in an even more obvious display of bias in its Order on Motions to Reconsider, Alter, and Amend Decree, made the conclusory remark that "[t]he most troubling question in this case involves the objectivity of many of those who involve themselves in the child sexual abuse industry." While there certainly is a "child sexual abuse industry"comprised of those who profit from the sexual exploitation of children, the Family Court's derogatory remark was directed at those who advocate on their behalf. The remark was clearly unrelated to the task before the court and reflected personal bias derived from extrajudicial sources. The derogatory remark, coupled with the Family Court's findings directly contradicted by the record, and its disregard of physical evidence, all indicate a personal bias on the part of the judge.

The right to a fair trial is so basic to our jurisprudence that it has been called "the most fundamental of all freedoms." *Estes v Texas*, 381 U.S. 532 (1965). It is a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression. *Nebraska Press Assn. v Stuart*, 427 U.S. 539, 586 (1976). A fair trial in a fair tribunal is a basic requirement of due process. *Weiss v United States*, 510 U.S. 163 (1994) *quoting*, *In re Murchison*, 349 U.S. 133, 136 (1955). An essential component to a fair trial is an impartial judge, *Weiss, supra*. The Due Process Clause "may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice'," *Aetna Life Insurance Co. v Lavoie*, 475 U.S. 813, 825 (1986), *quoting In re Murchison*, *supra* at 136.

Due process requires a judge to be impartial in weighing the evidence in the courtroom. In the case of *In re Murchison*, the judge relied on his personal knowledge and impression of what had occurred outside the courtroom (ie. in the grand jury room); his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination. In the instant case, the Family Court judge had a private bias against the testimony of young children, and evidence presented on their behalf, which he expressly and unequivocally made known in his amended

order. This so colored the Family Court's judgment that he conjured in his mind a fictitious, if not conspiratorial, "child sex abuse industry" comprised of child advocates and refused to follow the uncontradicted medical evidence of sexual abuse. As but one example, compare the following factual finding made by the Family Court with the evidence presented at trial:

The Family Court held:

> Both Teresa and Savannah were examined by Dr. Sara Shuh, a pediatrician. Dr. Shuh found no physical evidence that either girl had ever been penetrated with a needle or otherwise. Regarding Savannah, she did find certain scarring in the rectal area which, while they "were not inconsistent" with sexual abuse, could also be consistent with the child's history of constipation and urinary infections. App. 20A. Dr. Shuh found such scarring to be constipation problems the child had suffered. App. 27A.

On the contrary, Dr. Shuh had testified as follows:

> Q. And after examining those scars in this child, are those scars consistent with sexual abuse?
> A. They're consistent with --the hymenal scar is consistent with penetration of the hymenal opening into the vaginal canal, probably by an object which is not horribly -- not terribly large. I mean, it was a small scar and really healed as more of a notch than a deep scar, and the scar in the -- that was external to the vaginal opening but in the genitalia is compatible with penetration . . . App. 36A. The anal examination revealed two skin tags, one interiorly, one posteriorly, one posterior laterally . . . and a small posterior lateral scar which was visible in the anal canal. Its consistent with [sexual abuse]. App. 37A.

Regarding the urinary tract problems experienced by Savannah Herring, Dr. Shuh on cross-examination testified:

> I don't believe it [urinary tract infections] would explain the hymenal scar and I don't really think that because of the

nature of the scar that was in the posterior portion of the genitalia, it really didn't look like that. App. 39A-40A.

The Family Court Judge made erroneous findings regarding Savannah's rectal scarring. Further, it completely disregarded Dr. Shuh's testimony regarding the vaginal scarring and penetration even after the error was brought to his attention when the DSS and Guardian ad Litem moved for reconsideration. App. 36A. Moreover, the parents presented no expert testimony contradicting this compelling physical evidence.

A party is entitled to an adjudication of his or her rights before a neutral and detached judge in the first instance. *Ward v Village of Monroeville*, 409 U.S. 57 (1972). The petitioner raised and briefed the issue of bias in the South Carolina Court of Appeals. The issue first became clearly apparent when the Family Court issued its Order on Motions To Reconsider, Alter, and Amend Decree. Both the Court of Appeals and Supreme Court failed to expressly pass on the issue, implicitly rejecting the Petitioner's argument and remanding the case for further factual finding on the issues of mental injury and neglect to the very judge who had contradicted expert testimony, disregarded physical evidence of abuse, and against whom bias was alleged. By remanding this case to the very same judge, for all intent and purposes, the findings on neglect and mental injury has been predetermined. The South Carolina Supreme Court decision to remand solely on issues of neglect and mental injury is an inadequate remedy, making the need for review by this court all the more critical.

This Court has previously acknowledged that when a state takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. *DeShaney v Winnebago County, Dept. Of Social Services*, 489 U.S. 189, 199-200 (1989). *DeShaney* expressly recognized the constitutional duty of officials to protect against assault by private parties when the victim is in custody. *United States v Lanier*, U.S. , 12, fn.7, 65 U.S.L.W. 3814, 1997 U.S. Lexis 3658 (1997). In the instant case, a temporary order entered which awarded emergency

temporary custody to the DSS. Following the logic of *DeShaney*, the Family Court judge owed a constitutional duty to protect the children against assault by their parents and other private parties at the time of disposition of its final order. Instead, he allowed bias to infect the proceedings, made clearly erroneous factual findings contradicted by the record and, lacking the expertise to do so, concluded that the memory evidence of all young children is automatically suspect.

The notion that children are too suggestible to be credible is a symptom of the "Backlash" which has occurred against child protection in recent years. One authority notes, "[t]here is growing evidence of a backlash against child protection." J. Meyers, *The Backlash: Child Protection Under Fire* (Sage Publications 1994). Media reporting on child abuse is increasingly critical of the child protection system, giving rise to such catch phrases as "child abuse industry." *Id.* 86-89.

Critics of child abuse protection have organized and founded such groups as National American Man/Boy Love Association ("NAMBLA"), Victims of Child Abuse Laws ("VOCAL"), the False Memory Syndrome Foundation ("FMSF"), the National Justice Committee and a multitude of parental rights groups, with many spokespersons capturing the attention of the press. Confidentiality laws, however, restrict the ability of child advocates to freely speak on behalf of children to the press about specific cases. With this imbalance in place, and apparently conditioning uninformed judges, the need for appellate review is all the more critical where bias has been alleged.

Unsupportable theories and pseudoscience are now commonly cited as authoritative in the media. The research that is most frequently cited by the media on the testimony of children is that of Cornell University psychologist Stephen Ceci. Hayes, *Child's Word*, *ABC News Nightline*, November 14, 1996, Transcript #4039-1. The Ceci studies have been widely cited in the media as evidence for questioning children's accounts of sex abuse. *Id.* USA Today and the Boston Herald both cite to Ceci suggesting children can be induced to falsely claim abuse. *Id.* Ceci admits that these media accounts distort his findings: "not only do I believe

children can be reliable in sexual abuse cases, I believe the vast majority of them are reliable in those cases. Because in our studies we work at it very hard. I'm not talking about a single interview, where you sit down and you use a single leading question, and all of a sudden the child's giving you some highly elaborate narrative about something that never happened." *Id.*

It is exceedingly disturbing when family court judges embrace the rhetoric of the backlash by using such catch phrases as "child sex abuse industry" to describe medical doctors, psychologists, social workers, DSS caseworkers and child advocates. It is also disturbing when family court judges incorporate pseudo science propagated by media accounts into their decisions on critical issues dealing with the safety of children. Consequently, the South Carolina Supreme Court's failure to review the bias issue, instead remanding to the same judge, violates the children's right to a hearing before an impartial judge under the due process and equal protection clauses.

"Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Pennsylvania v Ritchie*, 480 U.S. 39, 60 (1987). The children in this case, even in the sterile and unfamiliar environment of the courtroom, did testify -- in their own words-- to specific instances of physical and sexual abuse on the part of their parents. Moreover, the testimony and medical evidence were corroborated by a medical doctor with expertise in the field of child sexual abuse evaluations. App. 34A-37A. Dr. Shuh's examination revealed vaginal and rectal scarring "consistent with sexual abuse". App. 36A; 37A. The testimony and physical findings were further corroborated by behavioral evidence observed of all three children indicative of sexual abuse.

This case is of compelling public importance. The children were entitled to a hearing before an impartial judge and, once certiorari was granted, plenary appellate review of their claim of bias. Child abuse in this country is far too prevalent to permit biased trial judges to adjudicate protective custody cases. In March

of 1996, the United States Department of Health and Human Services ("HHS") reported that in the year 1994, alone, 1,012,000 children in 48 states were victims of substantiated child abuse and neglect. *U.S. Dept. Of Health and Human Services, Child Maltreatment 1994: Reports from the States to the National Center on Child Abuse and Neglect* (Washington D.C.: U.S. Gov't Printing Office 1996). The HHS report found that 53 percent of maltreated children suffered neglect, 26 percent physical abuse, 14 percent sexual abuse, 5 percent emotional abuse, and 22 percent other forms of maltreatment.

In the fall of 1996, the HHS issued another report finding that the abuse and neglect of children in America nearly doubled between 1986 and 1993, indicating a dramatic increase in the severity of the problem in recent years despite the heightened social awareness. The HSS study estimated the number of children abused and neglected rose to 2.81 million in 1993 - up 98 percent from the figure of 1.42 million in 1986. More than 1,100 abused children died last year, an incomprehensible eighty percent of them at the hands of their own parents. *Child Maltreatment 1995: Reports from the States to the National Child Abuse and Neglect Data System*(Washington, D.C.: U.S. Gov't Printing Office 1997).

These statistics suggest that traditional means of redressing the problem through child protection agencies, the family courts and criminal justice system, have failed to curb even the rate of increase of child abuse. Allowing the high court's in our nation to delay and evade appellate review of bias claims by remanding for staleness in cases where evidence of child abuse is present only exacerbates a tragic social ailment and unnecessarily compounds the incidents of pain, damage and murder attributable to child abuse.

The social cost of child abuse is astounding, even staggering. Measured in monetary terms, the National Institute of Justice estimates the annual cost of child abuse to be $56 billion dollars. *Victim Costs and Consequences A New Look*, 1996. Bureau of Justice Statistics, U.S. Dept. of Justice NCJ-155282.

These statistics represent a frustrating and harsh reality when paired against the Family Court judge's prejudicial remark

about the "objectivity of the child sex abuse industry." Under the Constitution, the condition of being a young boy or young girl "does not justify a kangaroo court." *In re Gault*, *supra* at 28. Authorities who are more qualified than judges in regard to child behavior, question the conventional wisdom that children are less likely to be truthful on the witness stand than adults and that they are less capable of distinguishing the real from the imaginary. B. Marin et al., *The Potential of Children as Eyewitnesses: A Comparison of Children and Adults in Eyewitness Tasks*, 3 Law and Human Behavior 295, 304 (1979); G. Melton, *Children's Competency to Testify*, 5 Law and Hum. Behav., 75, 82 (1981); J. Landwirth, *Children as Witnesses in Child Sexual Abuse Trials*, 3 L. Guardian Rptr. (Issue IV 1987) p. 2; B. Nurcombe, *The Child as Witness: Competency and Credibility*, 25 J. Am. Acad. of Child Psychiatry 475, 479 (1986); Myers, *Evidence in Child Abuse and Neglect Cases*, Vol I, pp. 76-77, 232 (Wiley 1987).

Contrary to the Family Court's misguided belief in the inherent unreliability of memory evidence of young children, Nurcombe, *supra*, indicates: "if prompted, children as young as three years of age can recall past events quite well, although they will have difficulty under 10 years of age dating the events or attributing the appropriate motivation and intention to other people. Despite conventional wisdom, there is no evidence that children are more prone to lie than adults, and no evidence that they are more prone to confabulate or fabricate complex allegations."

Also in direct contradiction to the Family Court judge's prejudicial remark, Melton, *supra*, concludes that children's "memory appears to be no more of a problem than in adult eyewitnesses when recollection is stimulated with direct questions. Children are also no more prone to lying than adults".

Landwrith, *supra*, comments on child credibility as follows:

> A resurgence of activity in modern child psychology research suggest that there is little correlation between age and honesty and that children do not tend to fantasize about things outside of the realm of their normal life experiences. It has also been shown that children's short-term memory for

> facts about which they have understandable information may be as good as adults' and that children appear to be no more susceptible than adults about events for which their memory is equally strong. Similarly, the recanting of original statements by child victims, once taken as an expression of their propensity to fantasize, is now better understood as a manifestation of the complex family dynamics in child sexual abuse cases. J. Landwirth, *Children as Witnesses in Child Sexual Abuse Trials*, 3 L. Guardian Rptr. (IV 1987) p. 2.

Evidentiary expert and professor of law, John B. Meyers, summarizes the various studies regarding the suggestibility and credibility as follows:

> By age three, children recall salient events quite well. Children do not have a general memory deficit. Young children possess the memory skills to testify, especially when they are asked simple questions in a supportive atmosphere.
>
> Overall, psychological studies do not converge on a simple relation between age and suggestibility. It is clear, however, that children are not invariably more suggestible that adults. Suggestibility depends on cognitive, social, emotional, and situational factors, including the level of salience of the event. Myers, *Evidence in Child Abuse and Neglect Cases*, Vol I, pp. 76-77, 232 (Wiley 1987).

The Family Court's comments concerning the "inherent unreliability of evidence presented by children of this age" and "the memory evidence presented of children of this age," unreasonably classifies the testimony of children as automatically suspect. The Family Court Judge did so without any supporting expert testimony concerning memory evidence of children.

The Family Court judge's opinions lacked any thoughtful analysis of the wealth of scientific research related to memory, and specifically children's memories for traumatic events. The prejudicial remark regarding the "objectivity of the child sexual abuse industry" indicates an unwillingness on the part of the Family Court judge to undertake any serious consideration of these complex

issues. The South Carolina Supreme Court should have reviewed the bias issue instead of remanding the case to the same judge.

CONCLUSION

The petition for writ of certiorari to the South Carolina Supreme Court should be granted. Federal constitutional questions of compelling public importance concerning the rights of children in protective custody cases to meaningful appellate review under the equal protection and due process clauses are presented in this petition and warrant review on the merits by this court. A clear constitutional mandate for meaningful appellate scrutiny of child protective custody cases is needed in this nation.

THE PETITIONER,

SYLVIA LYNN GILLOTTE
Counsel of Record
Office of the Governor
Guardian ad Litem Division
103 S. Pine St., Suite 204
Spartanburg, SC 29302
(864)542-1861

HELEN L. McGONIGLE
Attorney at Law
P.O. Box 326
24 Meadowview
Brookfield, CT 06804-0326
(203)740-0074

No. _____

In The
Supreme Court Of The United States
October Term, 1996

IN THE INTEREST OF:
THE CHILDREN FOR WHOM SANDRA OVERCASH,
GUARDIAN AD LITEM,

Petitioner

v.

MR. DOE AND MRS. DOE,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

APPENDICES

JULY, 1997

APPENDIX TABLE OF CONTENTS

Order Granting the Petition for Writ of Certiorari filed October 7, 1996 In the South Carolina Supreme Court 1A

Memorandum Opinion No. 97-M-019 of The State of South Carolina Supreme Court filed March 24, 1997 2A-3A

Order of The Supreme Court of South Carolina denying Petition for Rehearing filed April 17, 1997 4A-5A

Unpublished Opinion of The State of South Carolina In The Court of Appeals O.p. No. 96-UP-022 filed January 23, 1996 6A-8A

Emergency Custody Order In the Family Court of the Fifteenth Judicial Circuit Filed November 23, 1992 9A-12A

Temporary Order (Not Ending Action) In the Family Court of the Fifteenth Judicial Circuit Filed August 4, 1993 13A-17A

Final Order (Ending Action) In The Family Court of the Fifteenth Judicial Circuit filed January 4, 1994 18A-24A

Order on Motion to Reconsider, Alter And Amend Decree filed March 1, 1994 25A-28A

Excerpts of Testimony of Sarah Shuh, M.D.
Expert in Pediatrics and Child Sexual
Abuse Evaluations 39A-41A

THE SUPREME COURT OF SOUTH CAROLINA

Horry County Department
of Social Services, Respondent,

v.

Mr. Doe and Mrs. Doe, Respondents,

IN THE INTEREST OF:
The Children
For Whom Sandra Overcash,
Guardian Ad Litem is, Appellant.

O R D E R

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in Horry County Dep't of Social Services v. Doe, Oop. No. 96-UP-022 (S.C. Ct. App. filed January 23,1996). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 226(h), SCACR.

s/Ernest G. Fry, Jr. C.J.
s/James E. Moore A.J.
s/John H. Waller, Jr. A.J.
s/E.C. Burnett A.J.

Associate Justice Jean H. Toal,
not participating

Columbia, South Carolina
October 7, 1996

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Horry County Department
of Social Services, Respondent,

v.

Mr. Doe and Mrs. Doe, Respondents,

In the Interests of
the Children
for Whom Sandra Overcash,
Guardian Ad Litem is, Petitioner.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS

Appeal From Horry County
Hugh E. Bonnoitt, Jr., Family Court Judge

Memorandum Opinion No. 97-MO-019
Heard march 18, 1997 - Filed March 24, 1997

DISMISSED

Sylvia Lynn Gillotte, of Spartanburg, for Petitioner.
Thomas F. Moran, Dominic A. Starr and Robert Calamari, all of Nelson, Mullins, Riley & Scarborough, of Myrtle Beach, for Respondents Mr. Doe and Mrs. Doe.
Charles E. Parrish, of Conway, for Respondent Horry County DSS.

PER CURIAM: We granted certiorari to review the Court of Appeals' decision in Horry County Department of Social Services v. Doe, Op. No. 96-UP-022 (S.C. Ct. App. filed January 23, 1996). We dismiss certiorari as improvidently granted.

While we are concerned about the disturbing evidence presented at trial, the record is insufficient to allow us to make a finding of what is in the best interests of the children, especially since the trial transcript is over three (3) years old. We agree with the Court of Appeals that remand is required. Atkinson v. Atkinson, 279 S.C. 454, 309 S.E.2d 14 (Ct. App. 1983). We remind the trial judge and the parties that the best interest of the children is of paramount importance, and evidence and findings addressing that specific issue are required. In view of the staleness of the record and the considerable passage of time, we urge that this matter be disposed of within ninety (90) days from the date of this opinion.

s/Ernest G. Finney, Jr. C.J.

s/James E. Moore A.J.

s/John H. Waller, Jr. A.J.

s/E.C. Burnett A.J.

s/Jean H. Toal A.J.

THE SUPREME COURT OF SOUTH CAROLINA

Clyde N. Davis, Jr.
Clerk of Court
Brenda F. Shealy
Deputy Clerk

P.O. Box 11330
Columbia, S.C. 29211
(803) 734-1080

April 17, 1997

Sylvia Lynn Gillotte, Esquire
103 S. Pine Street, Suite 204
Spartanburg, South Carolina 29302

Re: Horry County DSS v. Mr. Doe and Mrs. Doe
Case No. 92-DR-26-3244

Dear Ms. Gillotte:

The Court has refused your Petition for Rehearing in the above case in the follow Order:

"Petition for Rehearing is denied.

s/Ernest G. Finney, Jr. C.J.

s/Jean H. Toal A.J.

s/James E. Moore A.J.

s/John H. Waller , Jr. A.J.

s/E.C. Burnett III A.J.

April 17, 1997."

The remittitur in this matter is being forwarded to the Clerk of Court for Horry County.

Very truly yours,

s/Clyde N. Davis, Jr.
CLERK

CND,Jr/sbm

cc: Charles E. Parrish, Esquire
Thomas F. Moran, Esquire
Dominic A. Starr, Esquire
Robert Calamari, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Horry County Department
of Social Services,.....Respondent,

v.

Mr. Doe and Mrs. Doe,.....Respondents,

IN THE INTEREST OF:
The Children
For Whom Sandra Overcash,
Guardian Ad Litem is,.....Appellant.

Appeal from Horry County
H.E. Bonnoitt, Jr., Family Court Judge

Unpublished Opinion No. 96-UP-022
Heard January 9, 1996 - Filed January 23, 1996

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

PER CURIAM: The Horry County Department of Social Services (DSS) brought this action pursuant to S.C. Code Ann. §20-7-490 (1976) against Mr. Doe and Mrs. Doe seeking removal of their three minor children from their care and custody based on alleged physical and sexual abuse, neglect, and mental injury. On November 23, 1992, the family court issued an ex parte order directing removal of the children from the Does' custody and

placement of the children with the DSS. The basis for removal was an accusation of one of the children that he had been physically and sexually abused. After a merits hearing, the family court, on January 4, 1994, entered judgment in the Does' favor, expressly concluding there was insufficient evidence to warrant a finding of physical and sexual abuse as alleged by DSS and implicitly rejecting DSS's claims of neglect and mental injury. The family court, therefore, returned physical and legal custody of the children to the Does. Sandra Overcash, the children's guardian ad litem, appeals. DSS does not appeal. We affirm in part, reverse in part, and remand.

Although in appeals from family courts, an appellate court has jurisdiction to find the facts in accordance with its own view of the preponderance of the evidence, this broad scope of review neither requires us to disregard the findings of the family court nor relieves the appellant of the burden of convincing this court the family court committed error. Skinner v. King, 272 S.C. 520, 252 S.E.2d 891 (1979); Bramlett v. Davis, 289 S.C. 85, 344 S.E. 2d 867 (Ct. App. 1986).

The factors leading to the family court's findings that DSS provided insufficient proof of sexual and physical abuse dealt with the credibility of the testimony offered during the lengthy proceedings as well as the failure of DSS to present certain evidence, particularly corroborative physical evidence, to substantiate its allegations. See South Carolina Dep't of Social Servs. v. Forrester, 282 S.C. 582, 320 S.E.2d 39 (Ct. App. 1984) (Because an appellate court lacks the opportunity to observe the witnesses, it should give great deference to findings by the trial court where matters of credibility are concerned). Although the record reflects much evidence supporting physical and sexual abuse had the Family Court made such a finding, we find no abuse of discretion warranting our reversal of the family court's conclusion that the requisite evidence was lacking.

In finding a lack of sufficient evidence to support DSS's request for custody, however, the family court implicitly concluded DSS's allegations of neglect and mental injury were unfounded, but

did not make the specific findings of fact required to support dismissal of these allegations. See Rule 26, SCRFC ("An order or judgment pursuant to an adjudication in a domestic relations case shall set forth specific findings of fact and conclusions of law to support the court's decision.")' Atkinson v. Atkinson, 279 S.C. 454, 456, 309 S.E.2d 14, 15 (Ct. App. 1983) ("Proper appellate review is extremely difficult, if not impossible, where a lower court order omits specific findings of fact to support its legal conclusions."). The conflicting evidence presented at trial and the sensitive nature of this case cause us, as appellate judges, to hesitate to make our own fact findings on the issues of neglect and mental injury because of the importance of evaluating creditability, a responsibility best left to the family court.

Because we are concerned about evidence at trial indicating the children had inadequate clothing, poor hygiene, and irregular medical care, as well as a disturbing familiarity with sexual matters beyond their years, we remand the case to the family court for further proceedings on the issues of neglect and mental injury. In so doing, we recognize the children have been in the Does' custody during the two years this appeal has been pending and conditions in the Does' home may now be such that intervention by DSS would not be necessary. For that reason, we require the family court to conduct a de novo hearing based on the condition of the Does' home as of the time of the remand to determine if the children should remain in the environment or should be taken into protective custody again.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHAW, CURETON, and GOOLSBY, J.J., concur.

STATE OF SOUTH CAROLINA	)	IN THE FAMILY
	)	COURT
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL
	)	CIRCUIT
	)	FILE NO.92-DR-26-
EX PARTE:	)	
	)	
HORRY COUNTY DEPARTMENT SOCIAL SERVICES,	)	
	)	
PLAINTIFF,	)	EMERGENCY
	)	CUSTODY
VS.	)	ORDER
	)	
DAN HERRING	)	
LAURA HERRING	)	
	)	
DEFENDANTS	)	
IN RE:	)	
JAMES HERRING	)	
DOB 11-13-86	)	
SAVANNAH HERRING	)	
DOB 5-26-88	)	
TERESA HERRING DOB 8-29-89	)	
MINOR CHILD(REN) UNDER	)	
THE AGE OF EIGHTEEN	)	
(18) YEARS	)	
_____	)	

This matter came before the Court on November 23, 1992, on a Complaint whereby Plaintiff requests that this Court, acting pursuant to that authority given it under Section 20-7-610 of the Code of Laws of South Carolina (1976), as amended, issue its Order Ex Parte, granting emergency protective custody, and temporary care and control of the minor child(ren), James Herring, Savannah

Herring, and Teresa Herring to Plaintiff, Horry County Department of Social Services.

The Complaint before the Court alleges that the minor child(ren), James Herring, Savannah Herring and Teresa Herring is/are presently residing at 600 Lesia Lane, Conway, S.C. in Horry County, South Carolina, with Dan & Laura Herring, (natural parents, guardian, or others exercising temporary or permanent control). It is further alleged in the Complaint that probable cause exists to believe that by reason of abuse/neglect, there exists an imminent danger to the said child(ren)'s life or physical safety in the following particulars:

> On 11-19-92, DSS received information that James Herring stated he had been having oral sex with his father. James also stated that his mother would put tape on his mouth while she did "funny" things to his dad. James was observed being made to kiss his two younger sisters, 4 and 3 years of age, in the mouth by his father. James was also made to kiss his father on the mouth and there was a licking that occurred between the two. DSS feels that the allegations made by 6 year old James requires the three minor children to be placed in custody of the plaintiff for their protection from further abuse.

Plaintiff has submitted a sworn affidavit in support of the allegations and the Court has studied the information contained therein. Said affidavit and its allegations are hereby incorporated by reference in this Order.

Plaintiff has further submitted in said affidavit that those persons presently exercising control and custody over said minor(s) have not provided consent to Plaintiff's being granted temporary custody in that:

The parents are not in agreement.

Based upon the foregoing, it is the finding of this court that there is imminent danger to the life or physical safety of the minor child(ren) James Herring, Savannah Herring and Teresa Herring by reason of the abuse/neglect noted more fully hereinabove, said children presently being in the care and control of the Defendant(s), Dan Herring and Laura Herring, and that said persons) have/have not consented to Plaintiff's being given temporary custody. It is further the finding of this Court that the Horry County Department of Social Services, as the local child protective Services agency, is a proper party to have temporary custody under such circumstances.

IT IS THEREFORE, ORDERED that emergency protective custody and the temporary care and control of the minor child(ren), James Herring, Savannah Herring and Teresa Herring be awarded to Horry County Department of Social Services, and that the Department shall exercise temporary control over placement, planning, and supervision of said child(ren). the Department shall further have authority to take whatever action necessary for the immediate welfare of the child(ren) with regard to medical and/or educational attention including the right to have said child(ren) examined by a licensed physician and if, within the judgement, examination, and diagnosis of said physician, to have said child(ren) hospitalized and treated in accordance with the directives of said physician. It is further,

ORDERED that the Horry County Department of Social Services shall not attempt to take the said minor child(ren) into custody unless accompanied by a duly authorized law enforcement officer and that it shall be the duty of the accompanying law enforcement officer to take the said minor child(ren) in to actual emergency protective custody. It is further,

ORDERED that if the Horry County Department of Social Services retains temporary custody, then the merits hearing shall be held on the _____ day of _____ at _____ before the Honorable _____ in Courtroom _____ unless continued by consent of all parties OR upon issuance of an Order of Continuance by the Family Court Judge.

Failure to comply with the terms of this Order or willful interference in its execution shall be subject to the full contempt powers of this Court, with possible penalty of a $1,000.00 fine or one year in jail or both.

AND IT IS SO ORDERED.

s/_____
J.H. MURDOCH JR.
JUDGE, FAMILY COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT

DATED: November 23, 1992
CONWAY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE FAMILY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
HORRY COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff, vs. DAN HERRING AND LAURA HERRING, Defendants, IN RE: JAMES HERRING, D.O.B. 11/13/86 SAVANNAH HERRING, D.O.B. 5/15/88 TERESA HERRING, D.O.B. 9/29/89 MINOR CHILDREN UNDER THE AGE OF EIGHTEEN (18) YEARS	DOCKET NO. 92-DR-26-3244 TEMPORARY ORDER (NOT ENDING ACTION) HORRY COUNTY 93 AUG 4 AM 9:49 BILLIE G. RICHARDSON CLERK OF THE COURT

DATE OF TRIAL: July 15, 1993
TRIAL JUDGE: Honorable Kaye G. Hearn
PLAINTIFF'S ATTORNEY: Thomas D. Guest, Jr.,Esq. Present
DEFENDANT'S ATTORNEY: Richard L. Foltz, Esq. Present
ATTORNEY FOR GUARDIAN AD LITEM: George W. Cox, Jr. - Present

GUARDIAN AD LITEM:	Sandra Overcash - Present
DEFENDANT:	Dan Herring - Present
DEFENDANT:	Laura Herring - Present
CASEWORKER:	Robin Peterson - Present

This matter comes before the Court pursuant to a Motion filed by the Attorney for the Guardian ad Litem requesting that this Court temporarily suspend the visitation privileges of the Defendants Dan Herring and Laura Herring for the reasons outlined in the Motion, which was filed on June 24, 1993. Present at this hearing were the parties as are more fully noted above.

This Court reviewed five (5) separate Affidavits tendered by the Movant in support of the Motion and two (2) Affidavits tendered by Defendants in opposition to the Motion. The Court also considered oral argument for the attorneys for the respective parties. Based upon the foregoing, the Court makes the following Findings of Fact and Conclusions of Law.:

FINDINGS OF FACT

Based upon the Affidavits before me, as well as the oral arguments presented during the Motion hearing, I make the following findings of salient fact:

1. I find that the Defendants are the natural parents of the minor children caption above. I find that the Plaintiff initially became involved in this home situation after receiving a Report indicating possible abuse and/or neglect as is set forth in the Complaint on file with this Court. I further find that a Ten-Day Hearing was held in this matter on December 3, 1992 resulting in a

Temporary Order of this Court dated December 29, 1992 finding, interalia, that temporary legal custody with the right of discretion for appropriate physical placement was to be awarded to the Plaintiff, and the Defendant natural parents were to be allowed two (2) weekly visits with the minor children under the Plaintiff's supervision.

2. I find that a hearing on the merits of this case was set for January 21, 1993, but that psychological and medical evaluations had not been completed at that time and, with the consent of all parties and their attorneys, the mater was continued by Order of this Court dated February 17, 1993.

3. Thereafter, I find that a subsequent hearing on the merits was scheduled for April 8, 1993, but at that time the Court was advised that a negotiated settlement was not possible, and the matter was carried over until the "next available term of Court" by Order dated May 10, 1993.

4. I now find that it is imperative that a contested merits hearing in this matter be set as soon as possible in order to resolve the allegations of possible abuse and neglect that have been pending before this Court since the Complaint for Custody was filed on November 23, 1992.

5. I find there is some merit to the Guardian ad Litem's position that the frequency of the Defendants' visitation rights may be impairing the Plaintiff's ability to emotionally stabilize the minor children, but I decline to temporarily suspend in toto the visitation rights of the Defendants.

6. I find that the present visitation privileges enjoyed by the Defendants via previous Order of this Court shall be amended effective the week beginning July 19, 1993 so as to provide for visits with the minor children once every two (2) weeks until the Merits Hearing is concluded.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of fact, I make the following Conclusions of Law;

a. I conclude as a matter of law that this Court has jurisdiction of the subject matter and of the parties in the case at bar.

b. I further conclude that this Order shall have no precedential value for purposes of a final hearing, although I conclude it is in the best interest of the minor children and all parties to this action that they and this Court endeavor to set this matter for trial as soon as possible.

c. I further conclude that this Court has the authority to modify the frequency of the visitation rights to which the Defendants are entitled if, in so doing, the consideration of the best interests of the minor children dictates such modification.

Based upon the foregoing, IT IS HEREBY ORDERED:

1. The Defendants' existing visitation rights shall be modified, effective immediately, to provide for supervised visitation with the minor children once every two (2) weeks until a hearing on the merits is concluded and a Final Order issued.

2. This matter shall be set for a Final Hearing as soon as it is practical.

3. The payment of fees to the attorney for the Guardian ad Litem for services rendered in the case at bar shall be held in abeyance until the Final Hearing.

AND SO IT IS ORDERED.

Conway, South Carolina

s/_____
KAYE G. HEARN, PRESIDING
JUDGE, FAMILY COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT

July 26, 1993

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	
	)	IN THE FAMILY
HORRY COUNTY DEPARTMENT OF SOCIAL SERVICES,	)	COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
Plaintiff,	)	DOCKET NO. 92-DR-26-3244
vs.	)	
	)	FINAL ORDER
DAN HERRING AND LAURA HERRING,	)	(ENDING ACTION)
Defendants,	)	HORRY COUNTY 94 JAN 4 AM 9:52
IN RE:	)	BILLIE G. RICHARDSON
JAMES HERRING, D.O.B. 11/13/86 SAVANNAH HERRING, D.O.B. 5/15/88 TERESA HERRING, D.O.B. 9/29/89 MINOR CHILDREN UNDER THE AGE OF EIGHTEEN (18) YEARS	)	CLERK OF THE COURT

DATES OF TRIAL:	August 4 & 5, and December 7, 1993
TRIAL JUDGE:	Honorable H.E. Bonnoitt, Jr.
PLAINTIFF'S ATTORNEY:	Thomas D. Guest, Jr.
DEFENDANT'S ATTORNEY:	Richard L. Foltz
ATTORNEY FOR GAL:	George W. Cox, Jr.
GUARDIAN AD LITEM:	Sandra Overcash
COURT REPORTER:	Wanda Hughes

THIS MATTER came before the Court pursuant to the Plaintiff's Complaint filed November 23, 1992 alleging various acts of physical and sexual abuse. The Defendant filed an Answer denying all allegations on December 23, 1992. Trial of the matter was held on the above stated dates with all parties present, together with the caseworker for the Plaintiff, Robin Peterson. Testimony was presented by all parties and their witnesses over three days of trial. Based upon the evidence presented to the Court, I make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Defendants are the natural parents of the minor children.

2. The Plaintiff initially became involved in this case due to a report that at the time he was a patient at the Medical University of South Carolina, James Herring had stated that he had oral sex with his father. This allegation was not substantiated at trial by anyone from the Medical University. The Department of Social Services thereafter obtained an Order on November 23, 1992 to remove the minor girls from the Defendants' home and retain custody of all three children. The children have been in DSS custody since that time.

3. The thrust of the Plaintiff's case is based upon statements allegedly made by the children to caseworkers, therapists, and foster parents. All allegations seem to have started with observations of James by Brad Benjamin, a therapeutic assistant at MUSC, and what were interpreted as inappropriate sexual activities by James.

4. According to Amanda Hendricks, of the Department of Social Services, the allegations made by the girls were first made approximately a week or ten days after they were taken into custody and examined by therapists hired by the Plaintiff.

5. The accusations against the Defendants can be best summarized by separating them by child:

(a) James was alleged to have accused his father of performing oral sex in statements made to therapists at the Medical University of South Carolina in Charleston, S.C. Several witnesses from the Medical University were presented by the Plaintiff to corroborate that these statements were made by James at MUSC, but no such corroboration occurred. However, while on the witness stand, James, the oldest of the children, denied that this occurred or that the other sexually related allegations as they relate to him occurred. Regarding the sexual allegations, the only thing he could relate was that on one occasion he was led (or "pulled") down the hallway, with his clothes on, by his crotch area. I find this could have reasonably been a parent pulling a child by his trousers, being misinterpreted by a six-year-old child. James alleged at trial that he had "needles" stuck in his private parts on eight (8) different occasions. James' testimony was so contradictory it is hard to know what to believe. At trial he demonstrated the same language, behavior, and lack of veracity for which he has been treated on a number of occasions, both before and after emergency protective custody was taken.

(b). There was evidence presented that one or both the Defendants may have inserted "needles" into the vaginal area of one of the girls. Both Teresa and Savannah were examined by Dr. Sara E. Schuh, a pediatrician. Dr. Schuh found no physical evidence that either girl had ever been penetrated with a needle or otherwise. Regarding Savannah, she did find certain scarring in the rectal area which, while they "were not inconsistent" with sexual abuse, could also be consistent with the child's history of constipation and urinary infections. At trial, Savannah denied ever being stuck with a needle or stick pin. Teresa did not testify that she was stuck with a needle. There was no evidence presented to show physical evidence of insertion of "needles" into Jame's private parts.

(c) Allegations have been made that the Defendant Dan Herring ejaculated into Savannah's mouth; however, in her testimony, Savannah was inconsistent with the statements made to her therapists. Her testimony at trial was that her Daddy "pee-peed" in her mouth on four different days or occasions, and at least once when her mother, brother, sister, and two uncles were present. These allegations were the only abuse indicated by Savannah in her trial testimony. This testimony came only after Plaintiff's attorney told her in an indirect manner that she wasn't being truthful. She may also have been influenced by her foster mother who told her she would never see her again unless she told "the truth".

(d) Dan Herring has been accused of physically abusing his son James by punching him in the nose. The evidence presented, however, including that of James himself, is that the "injury" occurred during rough-housing and was at worst an accident.

(e) The Plaintiff complains of locks on the children's doors, on the outside, inferring that the children are locked in their rooms as a form on punishment. Even the children denied being locked in their room. The Plaintiff's rebuttal witness, Marsha Crossland, testified that, while she disagreed with the concept of locks on the doors, the Defendants had earlier told her that the locks were needed to keep the children out of their rooms.

(f) The testimony of Teresa, the youngest child, augmented by use of anatomically correct dolls, was so obviously rehearsed it is impossible to tell if it was actually what she independently recalled. She repeated the same litany over in exact detail.

(g) All of the children were counseled by the same person, Janice Pepper, over an extensive period. On August 5, 1993, Ms. Pepper had counseled James 20 times, Savannah 15 times, and Teresa 12 times. None of the sessions were taped or otherwise recorded, the reasons for which she was unable to explain. The anatomically correct dolls used by all three children at trial were provided by her. The children's familiarity with the dolls and

Teresa's obviously rehearsed testimony raises serious questions as to whether or not the comments made by the children either prior to Court or at the time of trial were their own recollections.

6. The Defendants deny all allegations raised against them. While recognizing the difficulty of disproving charges once made, I find the following as credible evidence on behalf of the Defendants:

(a) At the time of removal, the children were only aged 6, 4, and 3, respectively. This Court must be cognizant of the inherent unreliability of evidence presented of children this age and of their susceptibility to acquiring matters from their environment and encoding such matters to their experience.

(b) The minor child James had problems throughout his life, for which his parents repeatedly sought medical help, which problems continue to this date as evidenced by testimony of the foster parents and witnesses of the Department of Social Services.

(c) It was the parents, because of James' medical difficulties, who referred him to the Medical University of South Carolina for help. This Court must recognize that this act would be inconsistent with Plaintiff's accusations.

(d) From the time the first child was born, the Defendants either lived with other family members or had members of the family living with them the vast majority of the time up until the time the children were removed. When considered with the ages of the children, the only time the alleged abuse could have occurred would be after the Defendants returned from Texas in August, 1991, at which time James would have been age 5, and the younger children ages 3 and 2, respectively. During this time, the Defendants lived with Dan Herring's parents for approximately one month, then had one or both of Laura Herring's brothers living with them up to the time of removal.

(e) Defendants presented witnesses from their family and from their church who testified from their personal experience that they never saw evidence of abuse as presented by the Plaintiff. The Defendants spent on average three days a week at their church, with the children present, and many of these witnesses regularly visited their home.

(f) Robin Peterson indicated that the Defendants exercised their supervised visitation with the children on many occasions when she was the supervising agent. The children never appeared fearful and happily played with their father. No inappropriate contact or conversations were observed. The Defendants have completed all of the treatment plan recommended by DSS.

7. Evaluating the time frame in which the abuse must have occurred, I find it to be unlikely that of which the Defendants stand accused could have occurred without being observed by others who had regular contact with the Defendants.

8. Many of the Plaintiff's witnesses indicated in their testimony their dislike for Mr. Herring based on the way he conducted himself in dealing with them or while in their presence. While these opinions might influence one to feel Mr. Herring would be a poor parental figure, it is not a basis for removal of children from parental custody.

9. The initial referral of the child James was made by the Defendants after many years of trying to find medical help for their child. I note that there is no evidence that the referring pediatrician found any evidence of abuse, in fact the referral was made because of the child's parents' concern.

10. I further find that the problems experienced by the Defendants with the children have continued despite removal for over a year, indicating that they were already acting in behalf of the children before the allegations arose.

11. Based on the foregoing, I find there is insufficient evidence to find that physical or sexual abuse as alleged by the Plaintiff has occurred.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of fact, I make the following Conclusions of Law:

a. This Court has jurisdiction of the subject matter and the parties in the case at bar. Section 20-7-420 and 736, South Carolina Code of Laws, 1976.

b. The Plaintiff has failed to prove by a preponderance of the evidence that the alleged abuse occurred. Therefore, it is hereby

ORDERED, that the Plaintiff's Complaint be dismissed and that both physical and legal custody of the minor children be restored to the Defendants immediately.

AND IT IS SO ORDERED.

s/_____
H. E. Bonnoitt, Jr., Presiding
Judge of the Family Court for
the Fifteenth Judicial Circuit

January 3, 1994

Georgetown, South Carolina.

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE FAMILY
HORRY COUNTY OF SOCIAL SERVICES	)	COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
Plaintiff,	)	DOCKET NO. 92-DR-26-3244
vs.	)	
DAN HERRING AND LAURA HERRING,	)	ORDER ON MOTIONS TO RECONSIDER, ALTER, AND AMEND DECREE
Defendants,	)	
IN RE:	)	
JAMES HERRING, D.O.B. 11/13/86 SAVANNAH HERRING, D.O.B. 5/15/88 TERESA HERRING, D.O.B. 9/29/89 MINOR CHILDREN UNDER THE AGE OF EIGHTEEN (18) YEARS	)	

DATE OF HEARING: February 16, 1994
JUDGE: Honorable H.E. Bonnoitt, Jr.
PLAINTIFF'S ATTORNEY: John L. Sherrill, Esquire
DEFENDANT'S ATTORNEY: Richard L. Foltz

ATTORNEY FOR GAL: George W. Cox, Jr., and Ellen Snowber-Marini

COURT REPORTER: Debbie M. Wright

THIS MATTER came before the Court pursuant to Motions by both the Plaintiff and the Guardian ad Litem for the minor children, pursuant to Rule 59 and 60, South Carolina Rules of Civil Procedure, asking the Court to reconsider, alter, and amend the Final Order of January 3, 1994. After listening to the arguments presented by the attorneys for both parties and the Guardian ad Litem, I make the following findings and conclusions:

1. In Paragraph 5(e) of the Findings of Fact of the Final Order the finding, as stated, was that the Defendants had earlier told Marsha Crosland, a witness for the Plaintiff on reply, that the locks on the children's bedroom door was needed to keep the children out of their rooms. This finding was misstated and is corrected to find as follows: "Marsha Crosland testified that she disagreed with the concept of locks on doors and that the Defendant, James Herring, had told her, some two years before, that he had placed a lock on the bedroom door in order to lock James, the hyperactive child, in the room so as to protect the other children".

2. In paragraph 6(a) of the Findings of Fact of the Final Order, the finding states that the Court "must be cognizant of the inherent unreliability of evidence presented of children this age. . . ". This finding was misstated and is corrected to a finding as follows: "This Court must be cognizant of the memory evidence presented by children of this age and of such children's susceptibility to acquire matters from their environment and the authority figures therein and encoding such matters to their experience".

3. In paragraph 6(f) of the Findings of Fact of the Final Order, the findings state that the Defendants have completed all of the treatment plan recommended by D.S.S. This finding was incomplete and is hereby revised to state as follows: "The Defendants have completed all of the treatment plan recommended by D.S.S., except for the counseling which would be based on an admission by them of perpetrating abuse on their children, which they refused to do".

The remaining requests for alteration and amendments to the Final Order of January 3, 1994, are found to be without foundation or against the greater weight of the evidence. The Plaintiff and the Guardian ad Litem appear to wish the Court to make findings of abuse based on supposition and the validation of various symptoms they assume to be consistent with child abuse. In reality, the Defendants in this case took a child with severe behavioral problems to the Medical University of South Carolina for treatment after years of failure with numerous other treatment sources. The child's problems, which were exhibited at the Medical University, were interpreted to be possibly grounded in sexual abuse. The reaction by the Horry County Department of Social Services is evident by it's petition allegation that the child had stated that he had been having oral sex with his father. That the child ever made such a statement was never substantiated in Court. There was never any physical proof corroborating the statements later alleged to have been made by the children and, in fact, the physical examinations directly contradicted such allegations. In these Motions before the Court, the Plaintiff and Guardian ad Litem ask the Court to make a finding of possible sexual abuse based on an observation by Dr. Sarah Schuh of scarring in the area of the oldest girl's rectum. Dr. Schuh found such scarring to be consistent with the constipation problems the child had suffered. In addition, there was no testimony by that child or anyone she may have told, or who may have observed, that she was sexually abused in that area of her body.

The attorneys for the Guardian ad Litem also argue that the Guardian's report of statements to her by the children should be given greater weight, however, she testified at trial that she interviewed the children only two times. At the first interview, on January 8, 1994, the children made no statements alleging any sexual abuse. All such reported allegations were made at the second interview on May 11, 1994. This was after the children had been in therapy for an extended period.

The most troubling question in this case involves the objectivity of many of those who involve themselves in the child sexual abuse industry.

AND IT IS SO ORDERED.

s/_____
H. E. Bonnoitt, Jr., Presiding
Judge of the Family Court for
the Fifteenth Judicial Circuit

Georgetown, South Carolina

March 1, 1994.

STATE OF SOUTH CAROLINA	) IN THE FAMILY
	) COURT OF THE
COUNTY OF HORRY	) FIFTEENTH
	) JUDICIAL CIRCUIT
	)
HORRY COUNTY	) CASE NO. 92-DR-
DEPARTMENT OF	) 26-3244
SOCIAL SERVICES,	)
	)
PLAINTIFF	) TRANSCRIPT OF
	) TESTIMONY
VS.	)
DAN HERRING AND	)
LAURA HERRING,	)
DEFENDANTS.	)
	)

CONWAY, SOUTH CAROLINA

AUGUST 4, 1993
AUGUST 5, 1993
DECEMBER 7, 1993

B E F O R E :

HONORABLE H. E. BONNOITT, JR., JUDGE

A P P E A R A N C E S :

THOMAS D. GUEST, JR. ESQUIRE
Attorney for Department of Social Services

RICHARD L. FOLTZ, ESQUIRE

Attorney for the Defendants.

GEORGE W. COX, JR., ESQUIRE
Attorney for the Guardian ad Litem.

MS. SANDRA OVERCASH
Guardian ad Litem

WANDA H. HUGHES
Court Reporter

TESTIMONY OF SARAH SCHUH M.D. - DIRECT BY MR. GUEST

MR. GUEST: Your honor, at this time the State would call Dr. Sarah Schuh.

DR. SARAH SCHUH, BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE COURT: Have a seat right here and state your full name for the record.
A. Sarah Elizabeth Schuh, S-c-h-u-h.

DIRECT EXAMINATION BY MR. GUEST:
Q. Dr. Schuh, if you would, please, tell the Court where you're employed.
A. I'm employed at the Department of Pediatrics at the Medical University of South Carolina in the Children's Hospital.
Q. And where do you presently reside?
A. In Mt. Pleasant, South Carolina.
Q. How long have you been at the Medical University?
A. Since 1969.
Q. Okay, and where were you before that?
A. Before that, I was employed by St. Luke's Hospital as a physician and prior to that, received a degree in public health at Columbia University. I had worked for two years in Fulton County

and Dekalb County with the Department of Health. I received my medical school training at Columbia University in New York at the College of Physicians and Surgeons, and after graduation did a residency in pediatrics at St. Luke's Hospital Center in New York.
Q. Have you undergone any other training after you graduated from medical school?
A. I completed residency in pediatrics and I'm Board certified in pediatrics and have a degree in public health.
Q. Do you have any professional licenses or anything---
A. I was licensed originally in New York State, subsequently in Georgia, and have been licensed in South Carolina since 1969.
Q. And do you do any lecturing or consulting of any type in your position?
A. In my position, I'm responsible for programs involving both the teaching and evaluation of sexually or physically abused children within the Medical University, primarily, those admitted to the Department of Pediatrics, but I also consult with and teach for the other departments within the University as requested. That would include all of the colleges of the University, including the College of Nursing, Allied Health, and the College of Pharmacy, as well as consulting for the departments of obstetrics and gynecology, family medicine, and occasionally for other departments, dermatology, orthopedics, or whatever.
Q. And have you testified before?
A. Yes, I have.
Q. And during those times, you were found to be an expert in what field?
A. In pediatrics, and very often, also in the evaluation of sexually abused children.
Q. Your Honor, I would move at this time to have Dr. Schuh found to be an expert in that area.

MR. FOLTZ: No objection.

THE COURT: Do you stipulate to her qualifications?

MR. FOLTZ: Yes, Sir.

THE COURT: Mr. Cox?

MR. COX: Stipulation also, Your Honor.

THE COURT: All right, based on the stipulations, it's gonna be the finding of the Court that she is qualified as an expert in pediatrics and evaluation of sexually abused children.

DIRECT EXAMINATION RESUMED BY MR. GUEST.

Q. Dr. Schuh, could you please tell the Court -- well, first of all, which children have you examined?

A. I've examined Savannah and Teresa Herring.

Q. Okay, and what was the date of that visit?

A. January 15, 1993.

Q. And is that the only time you've ---

A. Yes, it is.

Q. And what was the reason for them coming to your office.

A. They were referred for an evaluation because of an allegation of physical abuse and possible sexual abuse.

Q. And if you would, what is your usual practice when you perform that type of an evaluation.

A. As with any medical case, the first step would be to take a history which may include questioning the adults that accompany the children, questioning the children themselves, and reviewing any written materials provided by those individuals relevant to the child's -- the allegations that are being investigated or evaluated.

Q. And did you take a history on that?

A. Yes, I did.

Q. And what was the source of that history?

A. I received part of the history from Robin Peterson of the Department of Social Services, some from a review of the -- a portion of the medical record of James Herring, the children's brother, and of course, some from talking to the children.

Q. Now, when you're taking a history in the course of the medical evaluation for the physical or sexual abuse,
what specific information are you looking for?

A. In a case where the allegation involves possible physical or sexual abuse, I would be looking for anything which would indicate to me any particular or special procedures that might be needed such as x-rays or blood tests, as well as indications which suggest where

any injury may have occurred on the child, so I would pay particular attention to that area in doing the physical examination.

Q. And in this case, was there any pertinent history which effected examination of these children?

A. Yes, there was an allegation that the children had been physically abused and that---

MR. FOLTZ: Excuse me, Your Honor. Before we get too far into this line of questioning as far as the evidence, it might be appropriate to find out if the Solicitor intends to take this information off of one of the reports or statements that I do have of Dr. Schuh, or is he getting some hearsay evidence that may have come from another source or other statements.

THE COURT: Well, Mr. Foltz, if she says anything that the children told her that are not contained in the information that was provided to you, then you need to make your objection over it.

MR. FOLTZ: All right, Sir.

THE COURT: I mean, I don't know what your objection is right now, I assume it's to some form of hearsay, but you haven't specifically stated that.

MR. FOLTZ: Well, Your Honor, certainly that's what made me rise because the Doctor began to talk about receiving reports from somebody, and so I certainly object to any testimony as far as what these reports do say, regardless of where they are from, and then we have to get to this issue with the children. If she's gonna be saying that it came from the children---

THE COURT: Well, I think the first time she indicates in any of her testimony that it's any kind of hearsay, then you need to object until there's a foundation laid, and then if you got a basis for an objection, I'll be happy to hear from you.

MR. FOLTZ: All right. Well, at this time, I am objecting to the beginning of this answer that is talking about receiving information from a report that the doctor is about ready to testify about.

THE COURT: All right. How about it Solicitor?

MR. GUEST: Your Honor, again, we discussed this earlier. I think the Doctor, as an expert, has to be able to lay the foundation as to what she bases her expert opinion on, and she has to base that

upon information she got from when the children were brought in so she can know what to look for and where she's going.

THE COURT: Okay, I think she stated that. She said she got her history from the children, some medical records on James, -- and the history she got was statements by the two girls, medical records on James, and some conversations with Robin Peterson.

MR. GUEST: Okay, did it go further than that, Your Honor? May I---

THE COURT: Well, you want her to reach some kind of conclusion, don't you?

MR. GUEST: Well, Yes, Sir.

THE COURT: She's telling you partially what the basis is, and she's had a – did a physical exam or whatever else she did as far as that's concerned, that's fine.

MR. GUEST: You've lost me, Your Honor. I apologize.

THE COURT: No, I'm not trying to lose you.

MR. GUEST: I mean, are we to proceed at this point.

THE COURT: Yes, sir, you've got to proceed.

DIRECT EXAMINATION RESUMED BY MR. GUEST:

Q. Dr. Schuh, in going back to going over the history with the children and the people that brought the children in, from what you learned from that, did that guide you to look at any specific areas to what you were looking for?

A. The reports that were given to me by Ms. Peterson and the review of the medical record indicated that the children had been hit and punched in the mouth or face – or excuse me, in the stomach or the genital---

MR. FOLTZ: Your Honor, this is the objection that I was trying to reach that she's now testifying about what was in the reports---

THE COURT: I'm going to sustain the objection.

DIRECT EXAMINATION RESUMED BY MR. GUEST:

Q. Okay, after receiving the information from Ms. Peterson and the other information that you got, what did that lead you to do, from that information, Dr. Schuh?

A. I performed an examination on each of the girls.

Q. Okay, and what type of examination was that?

A. I did a physical examination on each of the girls, starting first with Savannah. Savannah had given no particular history regarding any kind of painful or inappropriate contact until I was in the process of doing the examination. She did not have any evidence of injury to the face, chest or abdomen. She did -- was cooperative in the examination and in evaluating the genital examination, she did have normal external female genitalia which was pre-pubertal. The vaginal opening was generous but not enlarged for her age. The hymen was normal with the exception of a small notch representing an old scar in the interior portion, and there was also a small scar external the vaginal opening -- external and posterior to the vaginal opening. The rectal examination was of note in that the original rectal examination is done with the patient lying flat and her legs in kind of a frog-leg position, and then the secondary examination is done with the patient turned over face down with her buttocks in the air on her knees, which is called the knee-chest position. That's done in order that the buttocks can be more easily spread and the anus more easily -- or the external portion of the rectal opening more easily visualized. When I turned her over, she asked me if I was going to hurt her, and I asked her if she had been hurt there before or why was she asking the question. She did indicate that she had been hurt there before, but she did not name any person as being the person or indicate one. She said that she had been bitten by a dog at some point, although I didn't see anything that looked like there were any -- there were no tooth -- anything that looked like tooth scars from a dog. The physical examination of the enterectal examination did reveal a small, triangular tag scar which extended into the margin of the anal mucoso with the skin and also was adjacent to a paler scar which extended into the anal canal. There were no other anal or genital abnormalities in that -- that indicated any type of trauma other than those, and there were some small scars on the extremities, but those are not unusual in children, and did not particularly -- were not of particular note. We did laboratory testing on Savannah, although we did not test for gonorrhea because there was a history that the patient had vaginitis and had -- and was actually receiving antibiotics at the time we saw her. She had been evaluated, as I understand it, by another physician for vaginal

discharge, and I did not see a copy of that record. She reportedly did have a history of having inserted some tissue, that is a kleenex type tissue or toilet tissue, into the vaginal vulva area, and it was my understanding that they felt that the---

MR. FOLTZ: Objection, Your Honor. I believe she's getting into some information that she could only get from a source that would be hearsay at this point.

THE COURT: How about it, Mr. Solicitor? I think he's right. I'm gonna sustain it. It would take the conclusion by another person to---

DIRECT EXAMINATION RESUMED BY MR. GUEST:

Q. Now, Dr. Schuh, now this was on Savannah. Let me go back just one second. How many scars did you find on her?
A. She had a small scar in the hymen -- in the interior portion of the hymen. She had a scar in the genitalia posterior to the vaginal opening, and she had two scars which looked like they ran into each other and could have been sustained at the same time or separate times, one more externally on the anal opening and one extending into the anal canal.
Q. And after examining those scars in this child, are those scars consistent with sexual abuse?
A. They're consistent with -- the hymenal scar is consistent with penetration of the hymenal opening into the vaginal canal, probably by an object which is not horribly -- not terribly large. I mean, it was a small scar and really healed as more of a notch than a deep scar, and the scar in the -- that was external to the vaginal opening but in the genitalia is compatible with penetration, but scars in the anal canal can be seen sometimes from constipation which causes superficial tearing of the rectum.
Q. In your -- on Teresa, when you examined Teresa, what did you find with her?
A. The examination of Teresa was done also on the same day, and she also gave minimal information when I was first talking to her prior to the examination, but during the examination when I was -- had turned over and was looking at her anus, I was getting ready to

put in a cotton swab and she asked me if I was going to put a needle in, and I explained to her it wasn't a needle, but I asked her why she was asking that or if anyone else had put in a needle and she said, "Yes, it was black". I asked her who put the needle in, and she did name an individual. The physical examination revealed no evidence of any injuries to the face, the trunk or the abdomen, and the genitalia were normal, pre-pubertal female genitalia. There was no evidence of injury-- there was no evidence of injury to the vaginal opening and there was no evidence of injury to the hymenal tissues. The anal examination revealed two anul skin tags, one interiorly, one posteriorly, one posterior laterally and you can have congenital skin tags in the anul area, but they're usually not -- they're usually in the mid-line. They're usually not lateral, and they can be a result of injury to the anus or rectum. She did also have a small posterior lateral scar which was visible in the anal canal when she was in the knee-chest position and the anus open, somewhat relaxed, and you could see into the anal canal.

Q. And this scarring, could that also be consistent with sexual abuse.

A. It's consistent with it.

Q. Dr. Schuh, how many -- do you have any idea how many exams on little girls you've done?

A. On little girls?

Q. Yes, ma'am?

A. All together?

Q. Well, just an estimate.

A. Probably ten or fifteen thousand, I would think.

Q. Okay. If -- would it be unusual for a little girl to say that someone stuck a finger in her and it not cause any damage?

A. No, it would not be unusual at all. Now, I haven't done that many sexual abuse evaluations, but over the years, I probably have done a thousand or more exams for sexual abuse. It is well recognized and available in any text that introduction into the rectum, if done in a reasonably gentle manner, and particularly if there's any kind of lubrication or use of vaseline or lotion or anything, commonly leaves nothing at all visible. There may be

some redness immediately afterwards, but there is commonly no scarring of any kind. And nothing can be seen at a later date.

Q. And would it necessarily prove is disprove that there had been sexual abuse if the hymen was still intact?

A. No, not at all. Many forms of sexual abuse leave no physical findings. In fact, the majority of sexual abuse -- in the majority of cases where there is sexual abuse -- substantiated sexual abuse -- where there is substantiated sexual abuse and where there is sexual abuse acknowledged by the perpetrator, there are no physical findings because the sexual abuse may have involved only fondling. It may have involved oral sex which rarely leaves anything unless there's a sexually transmitted disease. It may have involved the use of lubricants. The vaginal opening may be sufficiently stretchy, I guess is the word you would say, to allow a finger to be introduced without damaging the hymen at all, so that it's not at all uncommon to have no physical finding -- no abnormal physical findings after sexual abuse has occurred and been substantiated.

Q. Is it common for girls that have been sexually abused to insert things into their vaginal areas?

A. I certainly wouldn't say it's common, but it does happen. It's not extremely rare.

Q. Would it be common for a child to inflict or to insert anything into their anal cavity?

A. I think that's seen less often, probably for a variety of reasons, including the fact that it's just harder to get at.

Q. Please answer any questions by—

THE COURT: Cross examination, Mr. Foltz?

CROSS EXAMINATION BY MR. FOLTZ:

Q. Thank you. Dr. Schuh, I'm Dick Foltz and I represent the Herrings on this. If I get your testimony, taking the last couple of questions, the absence of some of the physical evidence doesn't necessarily preclude sexual abuse by your testimony, so I guess the other way around it doesn't preclude that nothing happened at all either, right? I mean, it doesn't really draw any conclusions, is what I'm saying, by itself?

A. If there are no physical findings, there may have been sexual abuse or there may not have been sexual abuse.

Q. And if I'm following your testimony correct, there could even be – for example, one of your physical findings dealt with the scars in the anus, in the rectum. There could be some ordinary explanations that would preclude or have nothing to do with sexual abuse that would also be consistent with those findings? Is that correct?

A. I think that scarring leading to redundant tissue as tags is less common as a result of constipation of physiologic, if you will, injuries than those that are just thin, fine-line scars, but it certainly is not beyond the realm of possibility.

Q. Well, the main reason I'm asking is because I think that you even raised with Savannah the issue about the constipation. If you learned today that Savannah had a history of constipation as a young child—

MR. GUEST: I'm gonna object to that question, Your Honor.

THE COURT: Why?

MR. GUEST: That's not into evidence, and I don't think he can use that as a hypothetical to tell anything about constipation that's come into evidence.

THE COURT: I'm going to overrule the objection. I'm going to allow him to ask the question. All right, Sir, go ahead.

CROSS EXAMINATION RESUMED BY MR. FOLTZ:

Q. If you learned today that Savannah had a history of constipation as a young child, and in fact, even had to go the hospital on at least one occasion where she was administered numerous Fleet enemas in order to help clear her up, would that be a plausible explanation for her scars?

A. I would say possible rather than plausible.

Q. All right. Is it a possible explanation for some of the vaginal scars and the other scars that Savannah has, that if you learned today that because of a history where she had some urinary tract problems – to this day she even still wets a lot and she has a lot of infections in the urinary tract and complained of itching and burning from the urinary tract, her scratching herself in that area, would that be an explanation for these types of scars.

A. I don't believe it would explain the hymenal scar and I don't really think that because of the nature of the scar that was in the

posterior portion of the genitalia, it really didn't look like that. That's all I can say.

Q. Thank you. That's all I have, Your Honor.

THE COURT: Mr. Cox?

CROSS EXAMINATION BY MR. COX?

Q. Dr. Schuh, good afternoon. the hour is late, but I'd like to ask you a couple of questions. What was the length of your visit with them on the 15th of January of this year? How long did you---

A. Probably all together it was probably - I don't have an exact time, but close to two hours I would think.

Q. During that time, did you notice any inappropriate -- and by inappropriate, I mean for their age which is fairly tender years, self touching, fondling, masturbation, or anything like that?

A. During my exam, no.

Q. Yes, while you were with them, of your personal knowledge.

A. No.

Q. I think you were telling about an abasive procedure that one of the children mentioned with the needle, and she mentioned an individual. Who was that individual?

A. She mentioned her father. She said daddy.

Q. Daddy. Thank you.

THE COURT: Anything else?

MR. GUEST: No, sir, that's all I have.

THE COURT: Dr. Schuh, was there any evidence of any kind of needle injury to this child?

A. No, sir, but it was a little confusing to me because she said -- normally -- first of all, she is old enough to know colors. That was one of the questions. Normally, the needle that you would -- that I would think of in speaking to a child would be a needle that you might find at a doctor's office which would -- is one kind of needle kids tend to be familiar with, where the other one would be a sewing needle, and neither one of those would have been black, and the child told me it was black, so I'm not sure -- I could not get her to answer further questions. For example, one of the questions that I would like to have had her answer would have been, "Did you know it was a needle because you saw the needle, or did somebody tell you it was a needle, or because it felt like a needle," so there were some

questions -- because it was behind her and she said it was a needle, I had a lot of questions. Presumably, she saw it because she said it was black, but I'm not sure that -- I had a lot of -- I think there are a lot of unanswered questions about that particular remark, and she was not willing to respond to me any further, and it certainly needed to be explored, but I couldn't do it there.

THE COURT: You never examined James?

A. I don't believe so. I did review James' record.

THE COURT: Was there anything in the record that you reviewed at that time that indicated that he had informed anyone that he had had a needle inserted into his penis on eight separate occasions?

A. I'm sure I would remember that, and I certainly don't recall it. I did not go through the entire record. I had a summary of the record.

THE COURT: Did either one of the girls, when you took a history from them, did they relate to you -- either one of 'em relate to you at that time of any oral sex?

A. No, Sir. They talked very little to me, and I did not push them to talk to me because I knew they were seeing a therapist.

THE COURT: And neither one of 'em said anything about anyone urinating in their mouth or anything like that?

A. No, but I didn't ask.

Q. All right. Any other questions, Solicitor, now that I've asked the doctor a few questions? I'll give each one of you a chance to ask her anything else.

MR. GUEST: No, sir, Your Honor.

THE COURT: Mr. Foltz?

MR. FOLTZ: No. Sir.

MR. COX: Nor I.

THE COURT: Thank you, Doctor. Appreciate you being here. Do you want to excuse her, Solicitor?

MOTION FILED
AUG 11 1997

No. 97-79 (2)

In The

Supreme Court Of The United States

October Term, 1996

IN THE INTEREST OF: THE CHILDREN FOR WHOM SANDRA OVERCASH IS GUARDIAN AD LITEM
Petitioner

v.

MR. DOE AND MRS. DOE
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF *AMICI CURIAE*: ALLIANCE FOR THE RIGHTS OF CHILDREN (ARCH), ALLIANCE FOR SOUTH CAROLINA'S CHILDREN, CHILD, INC., CHILD ABUSE FORENSIC INSTITUTE, ECLIPSE, JOINING TOGETHER TO STOP SEXUAL ABUSE, JUSTICE FOR CHILDREN, MARILYN VAN DERBUR INSTITUTE, INC., MOTHERS AGAINST SEXUAL ABUSE (MASA),

(*AMICUS CURIAE* CONTINUED ON NEXT PAGE)
IN SUPPORT OF THE PETITIONER

Counsel for Amici Curiae
Eugene Falco, Esq.
45 Church Street
P.O. Box 625
New Hartford, CT 06057
(860) 379-7487

35 pp

(LIST OF *AMICI CURIAE*, CONTINUED)

NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, NATIONAL COMMITTEE FOR THE RIGHTS OF THE CHILD, NATIONAL COURT APPOINTED SPECIAL ADVOCATE ASSOCIATION (CASA), NATIONAL TASK FORCE ON CHILDREN'S CONSTITUTIONAL RIGHTS, NATIONAL VICTIM CENTER, ONE VOICE/AMERICAN COALITION ON ABUSE AWARENESS (ACAA), SURVIVORS AND VICTIMS EMPOWERED (SAVE), SOUTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE & SEXUAL ASSAULT, SOUTH CAROLINA EDUCATIONAL RESOURCE CENTER FOR MISSING AND EXPLOITED CHILDREN, SOUTH CAROLINA NURSES ASSOCIATION

IN SUPPORT OF PETITIONER

MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

The ruling of the court below and its resolution profoundly effects the diverse legal interests of the many children in this nation, including those of which are victims and alleged victims of physical abuse, sexual abuse, neglect and mental injury. The amici are in a position to present the issues in a broader and different perspective than the parties to this action.

The Petitioner consents to the filing of this amicus brief. The Respondents have withheld consent, necessitating this motion.

II. IDENTITY AND INTERESTS OF AMICI CURIAE

1) Alliance for the Rights of Children (ARCH), based in Virginia, is an incorporated nonprofit child advocacy organization dedicated to the protection of children from sexual abuse through public education and advocating for changes in public policy. ARCH is keenly aware of the system failures which can occur in instances where abuse occurs in the family. Its President is Glennie Rohelier.

2) Alliance for South Carolina's Children, based in Columbia, South Carolina is an independent, nonprofit, multi-issue child advocacy organization. The Alliance conducts research, offers community programs, distributes an annual "KIDS COUNT" report, supports legislation to protect children, and promotes increased public awareness of issues affecting children and families. Its President is John S. Niblock.

3) CHILD, Inc., also known as Children's Healthcare Is a Legal Duty, Inc. is a tax-exempt national membership organization founded in 1983 and based in Sioux City, Iowa. With a board of directors comprised of medical doctors, mental health professionals, attorneys and business people, Child, Inc. promotes the constitutional rights of children and maintains that child abuse and neglect violates children's constitutional rights. Its President is Rita Swan, Ph.D.

4) Child Abuse Forensic Institute, Inc. (CAFI), based in Napa, California, assists child abuse victims, accused abusers and governmental agencies in the development, investigation and/or litigation of child abuse cases and trains and educates the general

public and professionals regarding child abuse allegations. CAFI also provides professional forensic services in cases in which child abuse has been alleged. Its Executive Director and legal counsel is Seth Goldstein, Esq.

5) ECLIPSE (Emancipating Children from Legal Injustice, Pornography & Sexual Exploitation), based in South Carolina, is a national nonprofit corporation which provides legal, investigative and other professional assistance in severe cases of child abuse and trauma. ECLIPSE has an interest in representing the interests of child victims of severe child abuse, sexual abuse and trauma. Its President is Robert L. Millard.

6) Joining Together to Stop Sexual Abuse (JTSA), is a nonprofit organization based in Cleveland, Ohio and founded in 1993 through the combined efforts of attorneys, social workers, mental health care professionals, educators, adult survivors of child sexual abuse and concerned citizens dedicated to eradicating sexual abuse, proactively preventing child sexual abuse, and countering the effects of the backlash against survivors and child advocates. JTSA's Board President is Rhonda F. Day, MSSW.

7) Justice For Children ("JFC") is a national child advocacy organization headquartered in Houston, Texas. Formed in 1987, JFC advocates the interests of abused and neglected children whose cases have been lost in the child welfare, family court, and/or criminal justice systems. JFC has an interest in more fully presenting the impact of the lower court's decision on all child victims of physical abuse, sexual abuse, and neglect. JFC's president and legal counsel is Randy Burton, Esq.

8) Marilyn Van Derbur Institute, Inc. ("MVDI"), based in Denver, Colorado, was founded by spokesperson and 1958 Miss America Marilyn Van Derbur. Ms. Van Derbur, also a co-founder of One Voice, repressed her memories as an incest survivor until age 24 and has spoken publicly in an effort to stop the sexual exploitation of children. MVDI has an interest in the petition by more fully presenting to the court the subject matter of child sexual abuse as it relates to the legal issues in this case.

9) Mothers Against Sexual Abuse ("MASA"), based in Monrovia, California, is a national non-profit organization founded for purposes of educating society on the occurrence and debilitating effects of child abuse, supporting legislation to protect children, and providing resources for victims and families. MASA has an interest

in more fully representing the legal interests of child victims of sexual, physical and emotional abuse. Its president and founder is Claire R. Reeves.

10) National Association of Counsel For Children (NACC), located in Denver Colorado, was founded in 1977 to promote quality representation for children in the legal system. The NACC's mission is to improve the legal protection and representation of children by training and educating child advocates and by effecting policy and legal system improvements. With a membership of attorneys and judges, as well as representatives from the fields of medicine, mental health, social work and education, NACC interest in this case is enhancing the well-being and protecting the legal rights of children nationwide. NACC's Executive Director is Marvin Ventrell, J.D.

11) National Court Appointed Special Advocate Association (CASA), based in Seattle, Washington is the national membership organization, and technical assistance and training provider for volunteer CASA and Guardian ad Litem programs throughout the United States, networking almost 700 programs in all fifty states. National CASA advocates the best interests of abused and neglected children in the courts, promotes quality volunteer representation for children, and seeks to provide each child a safe, permanent and nurturing home.

12) National Committee on the Rights of the Child works to improve the legal status of children by undertaking carefully selected precedent-setting litigation aimed at establishing the constitutional and legal rights of children. One of its fundamental purposes is to end the denial to children of constitutional procedural rights, with the goal of establishing the right of children to access to courts to protect themselves in every significant way. Dedicated to establishing that children are "persons" under the United States Constitution and entitled to the fundamental protective rights contained in the Bill of Rights, NCRC has an interest in the petition by more fully presenting to the Court the need to recognize the constitutional rights of children. Its President is Ted Steege.

13) National Task Force for Children's Constitutional Rights was founded in 1988 by Connecticut Superior Court Judge Charles D. Gill and Dr. Anne Burgess of the University of Pennsylvania. The Task Force is a multi-disciplinary organization with membership in fifty states and has appeared as amicus curiae in appeals in state and federal courts where the constitutional rights and interests of

children are at stake. The Task Force has an interest in more fully demonstrating to this court the need for granting review in this case to decide issues of compelling public importance involving the constitutional rights of children.

14) National Victim Center ("NVC"), a nonprofit organization based in greater Washington, D.C., is a leading advocate for victims of violence. NVC promotes the responsiveness of the criminal and civil justice systems to the rights and needs of crime victims, and works to increase public awareness concerning their plight. NVC has been the pioneer in advocating the restorative justice for crime victims through the civil justice process.

15) One Voice/ACAA ("One Voice"), based in Washington, D.C., is a national non-profit organization formed to improve the quality of life for children and adult survivors of incest, sexual abuse, and physical and emotional abuse, through public education, advancements in law, justice and public policy. One Voice has an interest in assuring that the issues relating to child abuse, incest and sexual abuse can be more fully presented. American Coalition For Abuse Awareness ("ACAA"), is the public policy project of One Voice. One Voice/ACCA's president is Sherry Quirk, Esq.

16) Survivors And Victims Empowered ("SAVE"), based in Pennsylvania, is a nonprofit organization formed to prevent the criminal neglect and physical, emotional and sexual abuse of children and assists adult survivors of childhood trauma. SAVE has an interest in more fully presenting the impact of the lower court's decision upon child victims of physical abuse, sexual abuse and neglect. Its executive director is L. Philip Sheldon, Jr.

17) South Carolina Coalition Against Domestic Violence & Sexual Assault, based in Columbia, South Carolina and formed in 1981, is a state-wide organization which monitors and influences policy and legislation on domestic violence and sexual assault issues, and promotes awareness of the prevalence of family violence against children, women and men. Its Executive Director is Susan Higginbotham.

18) South Carolina Educational Resource Center For Missing and Exploited Children, based in Greenville, South Carolina, and founded in 1984, provides a centralized training and referral service addressing missing and exploited children and related family issues. The Center has an interest in protecting exploited children in the state of South Carolina.

19) South Carolina Nurses Association, is a constituent member of the American Nurses Association based in Columbia, South Carolina. It is a membership organization comprised of registered nurses, to support professional goals and responsibility in the field of nursing for registered nurses and serves as an advocate for the interests of nursing patients and clients.

III. ARGUMENT ON THE MOTION

The prevalence of child abuse, child sexual abuse, and neglect in this country is astounding and worsening. Last year, the U.S. Department of Health and Human Services reported that an estimated 3 million American children were abused or neglected, twice as many as five years earlier. Proclamation No. 6981, 62 Fed. Reg. 16035 (1997). Almost half a million of our nation's children were seriously injured due to child abuse and neglect, quadruple the number of the previous year. Our president has declared that "we must not let this senseless suffering continue". *Id.*

The nineteen amici curiae are all committed to protecting the rights of children and preventing child abuse. Without the commitment, knowledge and assistance of these organizations, many more children would find themselves victims of physical abuse, sexual abuse and neglect. The expertise of the amici in the areas of children's law, children's constitutional rights, and the subject matter of child abuse will provide the Court with a much broader perspective of the issues raised in the petition. It is respectfully requested that this Court grant the request of the amici for leave to file the annexed amicus brief.

THE AMICI CURIAE

Eugene Falco, Esq.
45 Church Street
P.O. Box 625
New Hartford, CT 06057-0625
Tel no. 860-379-7487
Counsel for Amici Curiae

No. 97-79

In The

Supreme Court Of The United States

October Term, 1996

IN THE INTEREST OF: THE CHILDREN FOR WHOM SANDRA OVERCASH IS GUARDIAN AD LITEM
Petitioner

v.

MR. DOE AND MRS. DOE
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

BRIEF OF *AMICI CURIAE*: ALLIANCE FOR THE RIGHTS OF CHILDREN (ARCH), ALLIANCE FOR SOUTH CAROLINA'S CHILDREN, CHILD, INC., CHILD ABUSE FORENSIC INSTITUTE, ECLIPSE, JOINING TOGETHER TO STOP SEXUAL ABUSE, JUSTICE FOR CHILDREN, MARILYN VAN DERBUR INSTITUTE, INC., MOTHERS AGAINST SEXUAL ABUSE (MASA), (*AMICUS CURIAE* CONTINUED ON NEXT PAGE) IN SUPPORT OF THE PETITIONER

Counsel for Amici Curiae
Eugene Falco, Esq.
45 Church Street
P.O. Box 625
New Hartford, CT 06057
(860) 379-7487

(LIST OF *AMICI CURIAE*, CONTINUED)

NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, NATIONAL COMMITTEE FOR THE RIGHTS OF THE CHILD, NATIONAL COURT APPOINTED SPECIAL ADOVOCATES ASSOCIATION (CASA), NATIONAL TASK FORCE ON CHILDREN'S CONSTITUTIONAL RIGHTS, NATIONAL VICTIM CENTER, ONE VOICE/AMERICAN COALITION ON ABUSE AWARENESS (ACAA), SURVIVORS AND VICTIMS EMPOWERED (SAVE), SOUTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE & SEXUAL ASSAULT, SOUTH CAROLINA EDUCATIONAL RESOURCE CENTER FOR MISSING AND EXPLOITED CHILDREN, SOUTH CAROLINA NURSES ASSOCIATION

IN SUPPORT OF PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Equal Protection and Due Process Clauses of the 14th Amendment prohibit appellate courts from remanding protective custody cases on the basis of staleness simply because time has elapsed while on appeal?

II. Whether children in protective custody cases are constitutionally entitled to meaningful appellate review of a judicial bias claim under the equal protection and due process clauses of the 14th amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	I
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
IDENTITY AND INTERESTS OF THE AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	6
ARGUMENT	
I. THE ISSUES PRESENTED BY THIS CASE ARE OF CRITICAL IMPORTANCE TO CHILDREN	9
II. CHILDREN HAVE A FUNDAMENTAL RIGHT TO MEANINGFUL APPELLATE REVIEW OF THEIR CLAIMS OF JUDICIAL BIAS NOTWITHSTANDING ISSUES OF STALENESS CAUSED BY THE APPELLATE PROCESS ITSELF	11
CONCLUSION	19

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

Article IV 10

First Amendment 10

Fourteenth Amendment 13, 15

STATUTES

S.C. Code Ann. §20-7-736 (1976) 7

FEDERAL CASES

Bradwell v. Illinois, 16 Wall. 130 (1872) 18

Bellotte v. Baird, 443 U.S. 622,6438 8

Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327 (1980) 14

City of Cleburne Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 12

Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990) 12

Dred Scott v. Sanford, 19 How. 393 (1857) 17

Eastway Construction Corp. v. New York, 637 F. Supp. 558 (E.D.N.Y.) 17

Hammer v. Dagenhart, 247 U.S. 251 (1918) 14

In re Gault, 387 US 1 (1967) 11, 12

Meyer v. Nebraska, 262 U.S. 390 (1923) 13, 14

Parham v. J.R., 442 U.S. 584 (1978) 15

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 13, 14

Planned Parenthood v Danforth,
428 U.S. 52 (1976) 9

Plyer v. Doe, 457 U.S. 202, 218, n.14 (1982) 8

Prince v. Massachusetts, 321 U.S. 158 (1944) 14

Ryland v. Shapiro, 708 F.2d 967
(5th Cir.1983), *cert. denied*,
474 U.S. 1032 (1985) 10

Taylor v. Ledbetter, 818 F.2d 791
(11th Cir. 1987) 16

Tinker v. Des Moines School District,
393 U.S. 503 (1969) 12

Trop v. Dulles, 356 U.S. 86 (1958) 15

STATE CASES

Aiken County DSS v. Wilcox, 304 S.C. ___,
403 S.E.2d 142 (Ct. App 1991) 7

Davis v Davis, 842 S.W.2d 588 (Tenn. 1992) 13

Horton v. Vaughn, ___ S.C. ___,
423 S.E.2d 543 (Ct. App. 1992) 7

Matter of Marriage of Ross, 783 P.2d 331
(Kan. 1989) 14

S.C. DSS v. Forrester, 282 S.C. 512,
320 S.E.2d 39 (Ct. App 1984) 7

OTHER SOURCES

H. Boswell, *The Life of Johnson*,
p. 47 (Hill ed. 1887) 6, 7

Cohen, *Relationships Between the Child,
the Family, and the State, in Perspectives on
The Family* 293 (M. Bayles, R. Moffit & J.
Greie, eds. 1990) 18

Elder, *Parental Power Legitimation and
Its Effect on the Adolescent*, reprinted inGoldstein
and Katz, *The Family and the Law*, 980 (1965) 17

James K. Genden, *Separate Legal Representation
for Children: Protecting the Rights and Interests of
Minors in Judicial Proceedings*, 11 Harv. C.R.C.L.
Law Rev. 565 (1976) 15

Charles D. Gill, *Essay on the Status of the
American Child 2000 A.D.: Chattel or
Constitutionally Protected Child-Citizen*?,
17 Ohio Northern L. Rev. 543 (1991) 12

Joseph Goldstein, Albert J. Solnit, Sonya
Goldstein & Anna Freud, *The Best Interests of the
Child: The Least Detrimental Alternative* (1996) 12

Stuart N. Hart, *From Property to Person Status: Historical Perspective on Children's Rights*, 46 Am. Psychologist 53 (Jan. 1991) 19

Dennis P. Ichikawa, *An Argument on Behalf of Children*, 2 Child Maltreatment 202 (Aug. 1997) 19

Robert H. Mnookin, *Child, Family and State* (1978) 18

Hillary Rodham, *Children Under the Law*, 43 Harv. Educ. Rev. 487 (1973) 8

Tremper, *Respect for the Human Dignity of Minors*, 39 Syracuse L. Rev. 1335 10

Laurence Tribe, *American Constitutional Law* 2d ed. (1988) 10

Barbara B. Woodhouse, *"Who Owns the Child?" Meyer and Pierce and the Child as Property*, 33 William & Mary L. Rev. 995 (1992) 14

BRIEF OF *AMICUS CURIAE*

IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

1) Alliance for the Rights of Children (ARCH), based in Virginia, is an incorporated nonprofit child advocacy organization dedicated to the protection of children from sexual abuse through public education and advocating for changes in public policy. ARCH is keenly aware of the system failures which can occur in instances where abuse occurs in the family. Its President is Glennie Rohelier.

2) Alliance for South Carolina's Children, based in Columbia, South Carolina is an independent, nonprofit, multi-issue child advocacy organization. The Alliance conducts research, offers community programs, distributes an annual "KIDS COUNT" report, supports legislation to protect children and promotes increased public awareness of issues affecting children and families. Its President is John S. Niblock.

3) CHILD, Inc., also known as Children's Healthcare Is a Legal Duty, Inc. is a tax-exempt national membership organization founded in 1983 and based in Sioux City, Iowa. With a board of directors comprised of medical doctors,

---

1. In accordance with Rule 37.6, counsel for amici represents that: he alone authored the argument portion of this brief without any monetary compensation or reimbursement whatsoever; attorney Helen L. McGonigle prepared the paragraphs describing the identity and interests of the amici curiae; and amicus ECLIPSE provided a monetary contribution towards the printing costs for this brief.

mental health professionals, attorneys and business people, Child, Inc. promotes the constitutional rights of children and maintains that child abuse and neglect violates children's constitutional rights. Its President is Rita Swan, Ph.D.

4) Child Abuse Forensic Institute, Inc. (CAFI), is a nonprofit organization based in Napa, California, assists child abuse victims, accused abusers and governmental agencies in the development, investigation and/or litigation of child abuse cases and trains and educates the general public and professionals regarding child abuse allegations. CAFI provides professional forensic services in cases where child abuse has been alleged. Its Executive Director and legal counsel is Seth Goldstein, Esq.

5) ECLIPSE (Emancipating Children from Legal Injustice, Pornography & Sexual Exploitation), based in South Carolina, is a national nonprofit corporation which provides legal, investigative and other professional assistance in severe cases of child abuse and trauma. ECLIPSE has an interest in representing the interests of child victims of severe child abuse, sexual abuse and trauma. Its President is Robert L. Millard.

6) Joining Together to Stop Sexual Abuse (JTSA), is a nonprofit organization based in Cleveland, Ohio and founded in 1993 through the combined efforts of attorneys, social workers, mental health care professionals, educators, adult survivors of child sexual abuse and concerned citizens dedicated to eradicating sexual abuse, proactively preventing child sexual abuse, and countering the effects of the backlash against survivors and child advocates. JTSA's Board President is Rhonda F. Day, MSSW.

7) Justice For Children ("JFC") is a national child advocacy organization headquartered in Houston, Texas.

Formed in 1987, JFC advocates the interests of abused and neglected children whose cases have been lost in the child welfare, family court, and/or criminal justice systems. JFC has an interest in more fully presenting the impact of the lower court's decision on all child victims of physical abuse, sexual abuse and neglect, nationwide. JFC's president and legal counsel is Randy Burton, Esq.

8) Marilyn Van Derbur Institute, Inc. ("MVDI"), based in Denver, Colorado, was founded by spokesperson and 1958 Miss America Marilyn Van Derbur. Ms. Van Derbur, also a co-founder of One Voice, repressed her memories as an incest survivor until age 24 and has spoken publicly in an effort to stop the sexual exploitation of children. MVDI has an interest in more fully presenting the subject matter of child sexual abuse as it relates to the legal issues in this case.

9) Mothers Against Sexual Abuse ("MASA"), based in Monrovia, California, is a national non-profit organization founded for purposes of educating society on the occurrence and debilitating effects of child abuse, supporting legislation to protect children, and providing resources for victims and families. MASA has an interest in more fully representing the legal interests of child victims and alleged victims of sexual, physical and emotional abuse. Its president and founder is Claire R. Reeves.

10) National Association of Counsel For Children (NACC), located in Denver Colorado, was founded in 1977 to promote quality representation for children in the legal system. The NACC's mission is to improve the legal protection and representation of children by training and educating child advocates and by effecting policy and legal system improvements. With a membership of attorneys and judges, as well as representatives from the fields of medicine, mental health, social work and education,

NACC's interest in this case is enhancing the well-being and protecting the legal rights of children nationwide. NACC's Executive Director is Marvin Ventrell, J.D.

11) National Court Appointed Special Advocate Association (CASA), based in Seattle, Washington is the national membership organization, and technical assistance and training provider for volunteer CASA and Guardian ad Litem programs throughout the United States, networking almost 700 programs in all fifty states. National CASA advocates the best interests of abused and neglected children in the courts, promotes quality volunteer representation for children and seeks to provide each child a safe, permanent and nurturing home.

12) National Committee on the Rights of the Child works to improve the legal status of children by undertaking carefully selected precedent-setting litigation aimed at establishing the constitutional and legal rights of children. One of its fundamental purposes is to end the denial to children of constitutional procedural rights, with the goal of establishing the right of children to access to courts to protect themselves in every significant way. Dedicated to establishing that children are "persons" under the United States Constitution and entitled to the fundamental protective rights contained in the Bill of Rights, NCRC has an interest in the petition by more fully presenting to the Court the need to recognize the constitutional rights of children. Its President is Ted Steege.

13) National Task Force for Children's Constitutional Rights was founded in 1988 by Connecticut Superior Court Judge Charles D. Gill and Dr. Anne Burgess of the University of Pennsylvania. The Task Force is a multi-disciplinary organization with membership in fifty states and has appeared as amicus curiae in appeals in state and federal

courts where the constitutional rights and interests of children are at stake. The Task Force has an interest in more fully demonstrating to this court the need for granting review in this case to decide issues of compelling public importance involving the constitutional rights of children.

14) National Victim Center ("NVC"), a nonprofit organization based in greater Washington, D.C., is a leading advocate for victims of violence. NVC promotes the responsiveness of the criminal and civil justice systems to the rights and needs of crime victims, and works to increase public awareness concerning their plight. NVC has been the pioneer in advocating the restorative justice for crime victims through the civil justice process. NVC has an interest in the petition by representing the interests of the many victims of incest, rape and other violence.

15) One Voice/ACAA ("One Voice"), based in Washington, D.C., is a national non-profit organization formed to improve the quality of life for children and adult survivors of incest, sexual abuse, and physical and emotional abuse, through public education, advancements in law, justice and public policy. One Voice has an interest in assuring that the issues relating to child abuse, incest and sexual abuse can be more fully presented. American Coalition For Abuse Awareness ("ACAA"), is the public policy project of One Voice. One Voice/ACCA's president is Sherry Quirk, Esq.

16) Survivors And Victims Empowered ("SAVE"), based in Pennsylvania, is a nonprofit organization formed to prevent the criminal neglect and physical, emotional and sexual abuse of children and assists adult survivors of childhood trauma. SAVE has an interest in more fully presenting the impact of the lower court's decision upon child victims of physical abuse, sexual abuse, emotional

abuse, and neglect. Its executive director is L. Philip Sheldon, Jr.

17) South Carolina Coalition Against Domestic Violence & Sexual Assault, based in Columbia, South Carolina and formed in 1981, is a state-wide organization which monitors and influences policy and legislation on domestic violence and sexual assault issues, and promotes awareness of the prevalence of family violence against children, women and men. Its Executive Director is Susan Higginbotham.

18) South Carolina Educational Resource Center For Missing and Exploited Children, based in Greenville, South Carolina, and founded in 1984, provides a centralized training and referral service addressing missing and exploited children and related family issues. The Center has an interest in protecting exploited children in the state of South Carolina.

19) South Carolina Nurses Association, is a constituent member of the American Nurses Association based in Columbia, South Carolina. It is a membership organization comprised of registered nurses to support professional goals and responsibility in the field of nursing for registered nurses and also serves as an advocate for the interests of nursing patients and clients.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When Boswell questioned support for a cause which one knows to be bad, Dr. Johnson replied:

> Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a

cause to be bad must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it: and if it does convince him, why, then, Sir, you are wrong and he is right. H. Boswell, *The Life of Johnson*, p. 47 (Hill ed. 1887).

In the present action, the petitioner on behalf of the children for whom she is guardian ad litem seeks to have this court require that the South Carolina Supreme Court review the children's claim of judicial bias instead of remanding the underlying case to the same judge against whom the children lodge their allegation of bias. Amici support this claim for relief, in the interest of these children and others similarly situated, to subject the factual determinations underlying the trial judge's decision to the crucible of meaningful appellate review.

South Carolina requires that the department of social services prove a case of abuse and neglect of children by a preponderance of the evidence. S.C. Code Ann. 20-7-736 (1976); *Aiken County DSS v. Wilcox*, 304 S.C. ___, 403 S.E.2d 142 (Ct. App 1991). Unlike Johnson's England, South Carolina grants broad discretion for its appellate courts to find facts based upon the reviewing court's own view of the evidence presented. See *Horton v. Vaughn*, ___ S.C. ___, 423 S.E.2d 543 (Ct. App. 1992); *Aiken County DSS v. Wilcox*, supra; *S.C. DSS v. Forrester*, 282 S.C. 512, 320 S.E.2d 39 (Ct. App 1984). Under South Carolina law, the children are not necessarily "wrong" and the judge "right".

Although the South Carolina Court of Appeals acknowledged that: "the record reflects much evidence supporting physical and sexual abuse had the Family Court

made such a finding"; Petition App. 7A; and expressed its concern about parental neglect and the children's "disturbing familiarity with sexual matters beyond their years"; Petition App. 8A; and, the South Carolina Supreme Court expressed its concern "about the disturbing evidence presented at trial"; Petition App. 3A; neither court exercised its authority and responsibility to provide the children with meaningful appellate review of their claims.

This Court has indicated that special vigilance is necessary when the victims of a discriminatory governmental practice are children, who have no representation in the government[2]. See *Plyler v. Doe*, 457 U.S. 202, 218, n. 14 (1982); (*Bellotte v. Baird*, 443 U.S. 662, 643 (plurality opinion) (concluding that states may not impose undue burdens on minor's exercise of constitutional rights).

The courts of South Carolina have ignored the rights of these children to meaningful appellate review of facts found by a trial judge whom their guardian claims showed egregious bias. The trial judge made findings of fact;

---

2. Children do not hold office, cannot vote, and possess no other direct access to government and political institutions that formulate public policy. First Lady Hillary Rodham Clinton wrote: "Lacking even the basic power to vote, children are not able to exercise normal constituency powers, articulating self-interests to politicians and working toward specific goals... The causes of younger children have not fared well, partly because these representatives [that children must rely on to speak for them] have loyalties diluted by conflicts between children's rights and their own institutional and professional goals." Hillary Rodman, *Children Under the Law*, 43 Harv. Educ. Rev. 487 (1973). Accordingly, children depend upon the courts to recognize and protect their basic rights. A lack of bias is an essential prerequisite of such protection.

Petition App. 19A-24A; that the petitioner illustrates contradicted the content and weight of the evidence at trial; Petition pp. 5-8. Moreover, the trial judge demonstrated on the record his bias by remarking that: "[t]his court must be cognizant of the inherent unreliability of evidence presented of children this age and of their susceptibility to acquiring matters from their environment and encoding such matters to their experience." Petition App. 22A. Upon reconsideration at the request of both DSS and the guardian, the trial judge remarked further: "[t]he most troubling question in this case involves the objectivity of many of those who involve themselves in the child sexual abuse industry." Petition App. 28A.

I. THE ISSUES PRESENTED BY THIS CASE ARE OF CRITICAL IMPORTANCE TO CHILDREN

Cases such as this will not go away. State courts are reaching inconsistent results based at least in part on divergent understandings of this Court's decisions concerning the rights of children and parents. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

Conflicting interpretations and uncertainties about the impact of this Court's decisions concerning the rights of children and their parents threaten the well-being and even the lives of children. Decisions returning a child to abusive parents unambiguously ignore the child's rights, needs and interests. They do so without consideration of, or even mention of, the holdings of this Court that a child is a 'person' protected by the Constitution. By leaving the child out of the equation, the decisions propagate the traditional

adult-centered perspective within family law which myopically analyzes only the rightness or wrongness of conduct by the competing adults and have not incorporated the fundamental principle that a child is a person.

Among the constitutional rights guaranteed to children and adults alike is the right to seek access to courts; see Tribe, *American Constitutional Law,* 2d ed. 10-18 (1988); based upon the 1st amendment, the due process clause of the 14th amendment, and the privileges and immunity clause of Article IV. *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), cert. denied, 474 U.S. 1032 (1985). This Court has extolled the right of access as a fundamental right protected by the Constitution.

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 148 (1907).

Neither a well-meaning adult who professes to have the child's "best interest" as a priority, nor a court which has a parens patriae interest in promoting children's welfare is sufficient. "For human dignity, the difference between the state's interest and the children's own interest is critical." Tremper, *Respect for the Human Dignity of Minors*, 39 Syracuse L.Rev at 1335 n. 250. Even concern for the parents' rights in this case does not bar meaningful appellate review of the guardian's bias claim. The children have been returned to their custody and will likely remain with the parents during the pendency of this appeal and any remand. The burdens of litigation placed upon the parents and the South Carolina courts are light when compared to the heavy

burden of children living in circumstances evidenced at trial and deprived of their opportunity to be heard fairly.

Justice Frankfurter observed: `The history of American freedom is, in no small measure, the history of procedure.' *In re Gault*, 387 U.S. 1, 20-21 (1967). Children experience manifest injustice when they are denied the opportunity for meaningful appellate review of claims of bias expressed in an optical-illusion-like focus on highly disputed facts presented in highly charged ideological terms, such as evoking the specter of the "child sexual abuse industry". The illusion of a fair hearing appears and then disappears absent a fully contextualized understanding. In the present case, the children are denied even an unbiased forum in which they can assert their interests. The anchoring principle of including the child as a person in the constitutional analysis would prevent the outcome from being determined by which ideological eye is cast upon the matter.

Amici submit that there is a compelling national interest in grant of certiorari so that this Court can consider, in a fully contextualized way, the extent and consequences of the treatment of children as property and not as persons in this and similar cases.

II. CHILDREN HAVE A FUNDAMENTAL RIGHT TO MEANINGFUL APPELLATE REVIEW OF THEIR CLAIMS OF JUDICIAL BIAS NOTWITHSTANDING ISSUES OF STALENESS CAUSED BY THE APPELLATE PROCESS ITSELF

More than 25 years ago this Court stated: "Whatever may be their precise impact, neither the 14th Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387

US 1, 13 (1967)[3]. This Court has determined that children "are 'persons' under our Constitution" and are "possessed of fundamental rights which the State must respect." *Tinker v. Des Moines School District*, 393 US 503, 511 (1969). As other of this Court's decisions hold, the fact that a person may not be able to act or choose autonomously is not dispositive, and "competence" in the usual adult sense is not a prerequisite to possession of constitutional rights. *City of Cleburne Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); see also *Cruzan v. Director, Missouri Dept. of Health*, 497 US 261 (1990). This Court has not determined the implications of this fundamental principle as it bears on the protection due children's appellate rights. This case squarely presents that issue.

An experienced Connecticut state court judge recently wrote, "It is ironic that although corporations in the United States have long been held to be persons,' and thus are eligible for constitutional protection, the extent to which children, as individuals, have comparable constitutional rights is still not entirely clear." Charles D. Gill, *Essay on*

---

3. Although *In re Gault* arose in the context of delinquency proceedings, this seminal decision has served as the foundation for the extension of constitutional protections to children in civil as well as criminal or quasi- criminal proceedings. The Court in *Gault* recognized that the civil-criminal dichotomy is often merely a talismanic rationalization for lesser procedural standards and instead determined that the proper inquiry concerns the substance of the exercise of power by a court. Even the dissent recognized that "[a] State in all its dealings must, of course, accord every person due process of law." (Emphasis added.) *In re Gault*, 80 (Stewart, J., dissenting). See also, J. Goldstein, A. Solnit, S. Goldstein and A. Freud, The Best Interests of the Child: The Least Detrimental Alternative (1996).

the Status of the American Child 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?, 17 Ohio Northern L. Rev. 543, 548 (1991). Amici assert that because a child is a 'person', it is relevant, in making custody decisions, how loss of that recognition as a person could affect both his or her well-being if not life itself.

As a "person" a child is protected by the Fourteenth Amendment to the United States Constitution. Among the fundamental elements of protections of the 14th Amendment is access to meaningful appellate review.

Childhood is a social process. The legal process can be reversed, but the social process cannot. Children must not wait for a court to tell them that they should have not have been abused sexually after they have already suffered the irreversible consequences of parental inaction. Interfering with the child's safety violates the child's rights. It treats him and his rights as constitutionally less significant than his caretakers and their rights. The child is reduced, thereby, to an instrument to serve the caretaker's needs, however perverse.

When faced with resolving a conflict between people who all have interests of constitutional magnitude, a court should "consider the positions of the parties' the significance of their interests, and the relative burdens that will be imposed by differing resolutions." *Davis v. Davis*, 842 S.W.2d 588, 603 (Tenn. 1992). Instead, South Carolina treats only the parents and trial judge as having rights while children are treated in the same manner as property to be owned, without independent human rights.

Meyer v. Nebraska, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), still much cited in defense of parents' rights, are grounded in notions of

children as property. *Meyer* and *Pierce* were "authored and joined by the Court's most inflexible laissez-faire conservative and grounded on economic substantive due process precedents." Barbara B. Woodhouse, *"Who Owns the Child?" Meyer and Pierce and the Child as Property*, 33 William & Mary L. Rev. 995, 1042 (1992). "[I]n *Meyer* the court vindicated the 'liberty' to control another human being . . ." Id. at 1099 n.577. As Governor Pierce of Oregon said during this Court's consideration of *Pierce*, "[I]t is a strange perversion of the word 'liberty' to apply it to a right to control the conduct of others." Id. at 1042. Although *Matter of Marriage of Ross*, 783 P.2d 331, 338 (Kan. 1989) arose in the context of a dispute over paternity testing, the Kansas Supreme Court noted the priorities to be set in resolving conflicts of rights: "Although someone may suffer, it should never be the child, who is totally innocent and who has no control over or conception of the environment into which he or she has been placed." Id. at 339.

This Court has itself recognized that harm to children's mental and emotional development involves injuries that cannot be reversed or remedied. *Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas*, 448 U.S. 1327, 1332 (1980) (irreparable harm to children of not being able to attend school; recognizing that developmental, emotional and behavioral damage to children cannot be repaired by a future legal remedy). The unique nature of the threatened harm to children situated as are these far outweighs the possible detriment to the adult parties, as recognized by the priority historically accorded to protecting vulnerable children. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Hammer v. Dagenhart*, 247 U.S. 251 (1918)(Holmes, J., dissenting).

Children have an interest in being protected from harm whether the harm comes from neglect or from the sexual abuse of their care givers. In *Parham v. J.R.*, 442 U.S. 584 (1978), this Court noted that, regardless of the state's respect for parental authority, and parental rights, "we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." Id. at 604 (emphasis added).

This case is part of a necessary paradigm shift in the law from children-as-chattel to children as rights-bearing people. The constitutional principles underlying this shift are well established. Courts, relying on tradition, have failed to apply them consistently to children. To the extent that case law reflects ideas of children-as-chattel instead of children-as-persons and has failed to consistently apply basic constitutional principles to children, the case law is due for a change. "The paucity of substantive law concerning the rights of minors in such matters as divorce, custody, juvenile delinquency, and mental health commitments may be attributable to the lack of independent representation in such proceedings." James K. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 Harv. C.R.C.L. Law Rev. 565 n.2 (1976).

Our legal concepts constantly change to reflect the growth of society's values, and such change is proper. As the 11th Circuit pointed out in extending the protection of the fourteenth amendment to children in foster care:

The fourteenth amendment, like the eighth amendment, `must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' *Trop v. Dulles*, 356 US 86, 101 (1958). With

contemporary society's outrage at the exposure of defenseless children to gross mistreatment and abuse, it is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds. *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987). See also, *Brown v. Chastin*, 416 F.2d 1012, 1027 (5th Cir. 1969) (Rives, J., dissenting)("a change of parental bondage during the tender years is hardly less upsetting of one's pattern of life than is the denomination and possible commitment of a child as a `juvenile delinquent' . . . .").

In breaking with common law tradition the Court will act consistently with well recognized fundamental constitutional and human rights principles and discard those portions of tradition which are inconsistent with the principles. Recognizing a child's right to meaningful appellate review recognizes the human dignity of minors.

To incarcerate a person without according a full panoply of due process rights violates our fundamental constitutional beliefs. A fortiori, the case of these children in a protection proceeding involving allegations of neglect and sexual abuse before a biased decision maker can be similarly characterized. Whatever rights the children may have go for naught if they are bound by bias. The right to meaningful appellate review is the only assurance that these children's interests and statutory and constitutional rights will be realized. The record in the proceedings below reflects confusion, unfairness, arbitrariness and victimization.

In ascertaining the "best interests" of the children in the heated struggle between these parents and the State, the trial court turned a deaf ear to the best available evidence -

the voices of the children. Children often complain that adults will not listen.

"When a child requests a reason or explanation concerning a particular restriction, at least two responses are open to a parent [or trial court judge]. On the one hand, the parent may fulfill the request and demand compliance; on the other, the parent [or trial court judge] may ignore the child's inquiry. From the child's perspective, this is essentially the difference between the expression of legitimate and coercive power." Elder, *Parental Power Legitimation and Its Effect on the Adolescent,* reprinted in Goldstein and Katz, *The Family and the Law* (1965), 980. In the legal context, the need to be listened to is realized through the "opportunity to be heard."

This paradigm shift in recognizing the legal status of children is similar to other paradigm shifts in this nation's history. It is at once a major change and yet at the same time simply a more consistent application of our professed principles. "Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless. The first attorney to challenge *Plessy v. Ferguson* was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to *Brown v. Board of Education.*" *Eastway Construction Corp. v. New York*, 637 F. Supp. 558, 575 (E.D.N.Y. 1986).

At this Nation's founding, the Founders proclaimed it as "self-evident" that "all men are created equal," and yet felt it obvious that African American men were "different," such that a black man had no rights which a white man was bound to respect. See *Dred Scott v. Sanford*, 19 How. 393 (1857). It was also obvious that women, of any race, were "different" and therefore could be denied the rights guaranteed to "all persons" -such as the right to vote.

(Shortly after ratification of the 14th Amendment, which promised all citizens equal protection of the laws, the U.S. Supreme Court upheld an Illinois prohibition against women becoming lawyers. *Bradwell v. Illinois*, 16 Wall. 130 (1872).)

African Americans, women and children have in common the history of being treated essentially as property and as exceptions to the social contract upon which our founding documents declared this nation to be based. In each case, the articulation of the principle that members of each group were constitutional "persons" came well before society in general and the legal system actually treated them as such.

Just as for African Americans and women, steps toward progress for children have not come easily or without protest and resistance. For example, we now take for granted the child labor laws passed during the early twentieth century. At the time, however, some religious leaders and conservative political forces opposed such laws as unwarranted governmental interference in the economy and the privacy rights of the family. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Robert H. Mnookin, Child, Family and State* 646-68 (1978).

One scholar notes that "from Roman times to the mid-nineteenth century [children] were treated as something akin to property and had rights which might be characterized as falling somewhere between those of slaves and those of animals." Cohen, *Relationships Between the Child, the Family, and the State, in Perspectives on The Family,* 293 (M. Bayles, R. Moffit & J. Greie, eds. 1990).

American attitudes toward the treatment of children did not begin to change until the end of the nineteenth century.

Dennis P. Ichikawa, *An Argument on Behalf of Children*, 2 Child Maltreatment 202 (Aug. 1997); Stuart N. Hart, *From Property to Person Status: Historical Perspective on Children's Rights*, 46 Am. Psychologist 53 (Jan. 1991). Even then, the Society for the Prevention of Cruelty to Animals was founded before a similar society to protect children.

"Tradition" could not sanctify slavery or segregation or disenfranchisement of women or discriminatory treatment of children born out of wedlock. It cannot sanctify treatment of children as stale chattel subject to sexual abuse. The vital claims raised by these children cry out for an unbiased hearing.

CONCLUSION

Due respect for the personhood and human dignity of children - the characteristics that distinguish them from property, which can be shunted about depending on claims of ownership, requires that we respect the appellate rights of children. They have only one childhood in which to accomplish all the tasks and meet all the challenges involved in growing up. They do not go into suspended animation while adults write appellate briefs.

The decision of the South Carolina courts only balanced, weighed, and judged the interests of contending adults rather than acknowledging that children have interests worthy of consideration. They treated the children as property. The U.S. Constitution, with its emphasis on the human dignity of all persons, requires more.

A meaningful opportunity to be heard surely requires that the courthouse doors be open to children seeking, through their guardian, the help of an appellate court system

to protect them in their vulnerability. The right to the opportunity to be heard is meaningless if the guardian is unable to speak for children before an unbiased tribunal.

Accordingly, amici respectfully request that this Court grant the petitioner's petition for writ of certiorari and undertake review of this case on the merits.

Respectfully submitted,

Counsel for Amici Curiae
Eugene Falco, Esq.
P.O. Box 625
45 Church Street
New Hartford, CT 06057
(860) 379-7487
Dated: August 2, 1997

ORIGINAL

3

No. 97-79

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

In the Interest of: the Children of whom Sandra Overcash is Guardian ad Litem,

Petitioner

v.

Mr. Doe and Mrs. Doe,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

MOTION TO PROCEED IN FORMA PAUPERIS AND BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

William C. Wood, Jr.
Counsel of Record
Keenan Building, Third Floor
1330 Lady Street
Post Office Box 11070 (29211)
Columbia, SC 29201
(803) 799-2000

Robert C. Calamari
Dominic A. Starr
Founders Centre, Suite 301
2411 Oak Street
Post Office Box 3939 (29578)
Myrtle Beach, SC 29577

Attorneys for Respondents

RECEIVED
SEP 15 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

30 pp

No. 97-79

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

In the Interest of: the Children of whom Sandra Overcash is Guardian ad Litem,

Petitioner

v.

Mr. Doe and Mrs. Doe,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

RESPONDENTS' MOTION TO PROCEED IN FORMA PAUPERIS

Pursuant to Supreme Court Rule 39.1, Respondents in the above-captioned matter move the Court for an order permitting them to proceed in forma pauperis. In the proceedings in the state courts, Respondents sought and were granted appointed counsel pursuant to S.C. Code Ann. § 20-7-110(2)(Supp. 1996). A copy of the order of the Horry County Family Court appointing Mr. Tom Moran, Esquire, of the undersigned's law firm as counsel for Respondents is attached for reference. The undersigned's law firm has represented Respondents, by appointment, through the appeals

before the South Carolina Court of Appeals and South Carolina Supreme Court.

Wherefore, Respondents, by counsel, respectfully request that they be permitted to proceed in forma pauperis before this Court.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

By: _____

William C. Wood, Jr.
Counsel of Record
Keenan Building, Third Floor
1330 Lady Street
Post Office Box 11070 (29211)
Columbia, SC 29201
(803) 799-2000

Robert C. Calamari
Dominic A. Starr
Founders Centre, Suite 301
2411 Oak Street
Post Office Box 3939 (29578)
Myrtle Beach, SC 29577
(803) 448-3500

Attorneys for Respondents

Columbia, South Carolina

9/10, 1997

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE FAMILY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT CASE NO. 92-DR-26-3244
HORRY COUNTY DEPARTMENT OF SOCIAL SERVICES, PLAINTIFF, vs. DAN HERRING AND LAURA HERRING, DEFENDANTS, IN RE: James Herring, Savannah Herring, and Teresa Herring, minor children under the age of eighteen (18) years.	**MOTION** **and** **ORDER** **(on remand from appeal)**

NOTICE OF MOTION AND MOTION

TO THE PLAINTIFF ABOVE-NAMED AND THE GUARDIAN AD-LITEM:

YOU WILL PLEASE TAKE NOTICE that five (5) days after service of this notice upon you, or as soon thereafter as counsel may be heard, the undersigned attorney for the Defendants will move before this Honorable Court for an Order substituting counsel for the Defendants.

The grounds for this Motion are set forth in the attached Motion to Remand for Substitution of Counsel (inter alia) before the Supreme Court. Also attached is a copy of the notice of the Order of the Supreme Court granting said Motion.

I SO MOVE.

Richard L. Foltz
Attorney for Defendants

Dated: 3/8/95
Myrtle Beach, South Carolina

3/9/95

Affirmation of Counsel:

Moving Counsel hereby affirms that he has communicated with opposing Counsel in this matter and that opposing Counsel do not object to this Motion.

Richard L. Foltz
Moving Counsel

Dated: 3/8/95
Myrtle Beach, South Carolina

ORDER

UPON CONSIDERATION of the foregoing Motion and for good cause shown, it is therefore

ORDERED, that Richard L. Foltz is hereby relieved as attorney for Defendants and that Tom Moran, Esquire, is hereby appointed and substituted in his stead. It is further

ORDERED, that copies of this Motion and Order be served upon substituted counsel, opposing counsel and filed with the Clerk of the Supreme Court within ten (10) days. It is further

ORDERED, that jurisdiction in this case is released back to the Supreme Court.

AND IT IS SO ORDERED.

Kaye G. Hearn
Chief Administrative Judge

Dated: March 27, 1995
Conway, South Carolina

No. 97-79

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

In the Interest of: the Children of whom Sandra Overcash is Guardian ad Litem,

Petitioner

v.

Mr. Doe and Mrs. Doe,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

William C. Wood, Jr.
Counsel of Record
Keenan Building, Third Floor
1330 Lady Street
Post Office Box 11070 (29211)
Columbia, SC 29201
(803) 799-2000

Robert C. Calamari
Dominic A. Starr
Founders Centre, Suite 301
2411 Oak Street
Post Office Box 3939 (29578)
Myrtle Beach, SC 29577

Attorneys for Respondents

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Case 1

Grounds for Denying the Petition 11

I. NO RIGHT TO APPELLATE REVIEW ON THE TRIAL RECORD WAS DENIED TO PETITIONER 11

II. THE MATTER IS MOOT 13

III. THE ISSUE OF JUDICIAL BIAS WAS NOT PROPERLY RAISED IN THE FAMILY COURT 15

IV. THERE IS NO EVIDENCE OF BIAS WARRANTING REVIEW BY THIS COURT 15

Conclusion 20

TABLE OF AUTHORITIES

Cases

Anderson v. Bessemer City, 470 U.S. 564 (1985) 12

Bowman Transp. v. Arkansas-Best Freight Syst., 419 U.S. 281 (1974) 12

DeFunis v. Odegaard, 416 U.S. 312 (1974) 14

DSS v. Doe, 355 S.E.2d 543 (S.C. App. 1987) 16

DSS v. Johnson, 394 S.E.2d 721 (S.C. App. 1990) 14

ICC v. Jersey City, 322 U.S. 503 (1944) 12

Idaho v. Wright, 497 U.S. 805 (1990) 18

Liteky v. United States, 510 U.S. 540 (1994) 19

Payne v. Holiday Towers, 321 S.E.2d 179 (S.C. 1984) 15

State v. Robinson, 735 P.2d 801 (Ariz. 1987) 18

Statutes

S.C. Code Ann. § 19-1-180 (Supp. 1994) 16-17

S.C. Code Ann. § 20-7-20(D)(1985) 14

S.C. Code Ann. § 20-7-764 (1985) 14

S.C. Code Ann. § 20-7-764(B)(1)(b)(Supp. 1996) 14

Rules

Rule 226, SCACR 2,12

Rule 26, SCRFC 2

Sup. Ct. R. 10 12,13

Sup. Ct. R. 15.2 1

STATEMENT OF THE CASE

The Petitioner selectively states the procedural history of the case and the evidence presented in the merits hearing before the family court. Pursuant to Sup. Ct. R. 15.2, Respondents submit this counter-statement of the case.

I. Procedural History

The merits hearing before the family court was held on August 4, 5, and December 7, 1993. On January 4, 1994, the family court entered its written order finding that the plaintiff, the Horry County [SC] Department of Social Services,[1] [hereinafter referred to as "DSS"] had failed to prove its claims of abuse against Respondents. On motion for reconsideration, the family court amended certain findings of fact, but not its conclusion of law that DSS had failed to prove abuse. At no point in the family court proceedings did DSS or Petitioner move to recuse the family court judge or otherwise raise the issue of bias with the family court.

The petition brushes past the next step in the procedural history of the case. Petitioner exercised her right to appeal. The South Carolina Court of Appeals received the briefs of Petitioner and Respondents. It heard oral argument. Petitioner

---

[1] DSS, the plaintiff, did not appeal the findings of the family court to the South Carolina Court of Appeals, did not join in the petition for certiorari review to the South Carolina Supreme Court and has not joined in the petition to this Court. Since remand of the matter by the South Carolina Supreme Court to the family court, DSS has specifically "unfounded" the case on May 20, 1997, and requested to be relieved of custody on July 29, 1997. Respondents' Appendix at 6-7, 9-10.) The case has been dismissed. (Resp. App. at 1-3.)

raised, for the first time, the question of bias on the part of the family court.

In an unpublished decision filed January 23, 1996, the court of appeals affirmed the decision of the family court and remanded for further proceedings. It particularly noted that the family court's decision "dealt with the credibility of the testimony offered during the lengthy proceedings as well as the failure of DSS to present certain evidence, particularly corroborative physical evidence, to substantiate its allegations." (Petitioner's Appendix at p. 7A.) The court of appeals remanded for further finding on the issues of neglect and mental abuse because the family court had not made "specific findings of fact and conclusions of law" on those issues as required by Rule 26, SCRFC. (Pet. App. at 8A.) Petitioner's request for rehearing and rehearing en banc was denied.

Having received full appellate review of the family court's orders by the court of appeals, Petitioner sought further, discretionary review from the South Carolina Supreme Court. See Rule 226, SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion . . . ."). The supreme court initially granted the writ, received briefs and heard oral argument. The supreme court subsequently dismissed the writ as "improvidently granted," noted that it could make no "finding of what is in the best interests of the children" due to the insufficiency and staleness of the record, and remanded for further proceedings. (Pet. App. at 3A.)

On remand, DSS "unfounded" the case against Respondents and requested that it be relieved of custody. (Resp. App. at 6-7, 9-10.) At a merits hearing on August 7, 1997, the family court, with a different judge presiding, dismissed the case in its entirety finding that there was no evidence of abuse of any type. (Resp. App. at 2.) Petitioner offered no evidence at the hearing.

II. The Evidence at Trial

The Petition presents a one-sided litany of the evidence presented at the merits hearing in the family court. The other evidence, which the family court chose to believe, is set forth below.

The three children at issue in the case are James, Teresa and Savannah. DSS became involved in this case after Respondent took James to the Medical University of South Carolina ("MUSC"). Since the age of two, James exhibited numerous signs of hyperactivity and attention deficit disorder. James would often hold his breath until he lost consciousness. (Resp. App. at 33.) In response to these problems, the Parents sought medical attention for James. Respondents saw at least four separate medical and psychiatric providers in an effort to correct James' behavioral problems. (Resp. App. at 33-37.)

In September, 1991, Respondents began taking James to Dr. Tom Petrusick in Myrtle Beach, South Carolina. (Resp. App. at 41-42.) After several medications failed to correct James' behavioral problems, Respondents agreed to have James admitted to MUSC for observation in 1992. (Resp. App. at 43.)

In late 1992, DSS was notified by an unidentified employee[2] at MUSC that James had made statements describing sexual abuse by his father. Based upon this information, DSS obtained an ex parte order on November 23, 1992, to remove Savannah and Teresa from Respondents' home and to retain custody of all three children. (Pet. App. at 9A-12A.)

The first witnesses called by the defense were Respondents. They testified at length about their relationships with their children and their efforts to properly raise them. Each testified that they were actively involved in and regularly attended their local church congregation. (Resp. App. at 31, 66-67.) All three children regularly attended church with their parents (Resp. App. at 32.), and were seen regularly by the other church members.

Both parents testified at length as to the behavioral problems that James exhibited while growing up. (Resp. App. at 38-40.) The father testified that James was taken to several doctors in an effort to treat James' hyperactivity. (Resp. App. at 33, 37.) Respondents also testified about James' behavioral problems, commenting that the medications provided by James' physicians were very rarely successful. (Resp. App. at 42, 75.) The family court found it unlikely that parents who were abusing their child would present that child to so many medical personnel. (Pet. App. at 22A.) The family court also noted that there was no evidence at

---

[2] This person was never identified by DSS or Petitioner and was not produced as a witness at the trial before the family court.

trial that any of these doctors ever expressed a belief that James had been abused. (Pet. App. at 23A.)

When asked whether James had experienced any physical problems, the Respondents indicated that James had developed a cyst on his penis as a result of a foreskin problem. A salve was prescribed by a doctor which was to be applied topically to the cyst. (Resp. App. at 48-49.) The mother testified that she would apply the salve to the cyst after taking James out of the bathtub. (Resp. App. at 80-81.) Both parents denied that there was ever any other form of touching James in that area.

Respondents also testified about the vaginal rashes and bladder infections that plagued Savannah during her early childhood. The father testified that in addition to these problems, Savannah was treated by medical professionals for severe constipation. (Resp. App. at 44-45.) The mother testified that these problems caused Savannah to occasionally display abnormal wetting, etc. (Resp. App. at 76-77.) Other than Savannah's problems, Respondents denied that either of the girls displayed any abnormal activity relating to their genitalia.

Respondents denied that they had abused any of their children in any way. The father testified that, with the exception of spankings, he never struck any of his children. (Resp. App. at 46.) He also denied that he engaged in any sexual talk or language around the children. (Resp. App. at 47.) He emphatically denied that he ever touched his daughters in a sexual way. (Resp. App. at 54.) Similarly, the mother denied that the children were ever

struck by her or her husband. (Resp. App. at 79.) She denied that her children were ever touched in an abnormal way. (Resp. App. 78.) Finally, she denied that she abused her children in any way (Resp. App. at 82), or that she ever saw her husband abuse the children. (Resp. App. at 83.)

Several family members also testified that they had never witnessed signs of any physical or sexual abuse of the children. Oscar Woodcock (an uncle) testified that he lived with the Respondents for a period of approximately seven months prior to the children's removal from the home. (Resp. App. at 94-95.) During the time that he lived with Respondents, he once saw James showing his penis to Savannah. (Resp. App. at 93.) Other than that, he never saw any sexual acting out by the children.

Another uncle, William Woodcock, also testified that he had been living with Respondents since early 1991. William testified that during the time that he lived with Respondents he never saw the children engaging in any sexually explicit play or actions. (Resp. App. at 96.)

Ruth Midgette, a grandmother, testified that she had never seen the children act out sexually in any way. (Resp. App. at 92.) There was also testimony from Teresa Williams, an aunt, who stated that she saw Respondents on an almost daily basis. She testified that she never witnessed the girls playing in a sexual way with their dolls. (Resp. App. at 88.) She also testified that she had never heard either girl talk about being physically or sexually abused. (Resp. App. at 88.) Ms. Williams testified

extensively about the hyperactivity exhibited by James. She also testified that James would lie to her when she caught him doing something wrong. (Resp. App. at 87.) This testimony is certainly relevant as to whether James' testimony at trial was truthful.

Two friends of Respondents also provided testimony. Ms. Nancy Booth testified that she attended church with Respondents. Ms. Booth was the Sunday school teacher for the three children. She testified that James was difficult in class because of his behavioral problems. (Resp. App. at 84.) Ms. Booth, like Ms. Williams, testified that James would lie to her in class when she would catch him doing something wrong. (Resp. App. at 85.) Ms. Booth also stated that she never observed anything unusual about the relationship between Respondents and their children. (Resp. App. at 86.)

Another member of the parents' church congregation, Mr. Windell Jeffords, also took the stand on their behalf. Mr. Jeffords testified that he saw the children at church regularly with their parents (Resp. App. at 89), and also when visiting the home. Mr. Jeffords testified that he never saw James acting out sexually in any way. (Resp. App. at 90.) He also testified that he never saw any of the children engaging in any self-touching or other sexual acts. (Resp. App. at 91.)

Dr. Schuh's testimony did indicate that Savannah had two small vaginal scars and two small anal scars. According to Dr. Schuh, Teresa's exam revealed no evidence of injury to her vaginal opening or her hymenal tissues. Dr. Schuh did note two anal tag

scars on Teresa. On cross-examination, however, Dr. Schuh indicated that Savannah's anal scars could possibly have been caused by severe, and medically documented, constipation problems that she suffered as a baby. (Resp. App. at 28-30.) Dr. Schuh also noted that while Teresa's anal scars were consistent with signs of sexual abuse, they could also be congenital. (Id.)

Petitioner points out that Teresa told Dr. Schuh that her father had inserted a needle into her anal area. Petitioner does not, however, point out that Dr. Schuh testified that this statement by Teresa was "confusing." (Resp. App. at 30.) Dr. Schuh went on to indicate that Teresa had no evidence of any needle scars in her anal area, nor could she understand why Teresa referred to the needle as black in color. Dr. Schuh testified that this statement made by Teresa would need to be explored further before it could be understood. (Id.)

Savannah made numerous statements that denied specific allegations of abuse asserted by DSS. Savannah twice denied that her father ever penetrated her with a finger. (Resp. App. at 17, 21.) She denied that she was ever stuck with a needle (Resp. App. at 18.); denied being bathed by her father (Resp. App. at 19.); denied that she had ever seen her father's penis (Resp. App. at 20); and denied that she was ever asked to rub her mother's vagina. (Resp. App. at 22.) Finally, Savannah testified that none of the children was ever stuck with a needle or pin by the parents. (Id.)

With respect to the testimony of Teresa, appellant takes exception to language in the family court's order indicating that

Teresa's use of the anatomically correct dolls was rehearsed. A review of the transcript of Teresa's testimony certainly indicates that Teresa proceeded in a very mechanical fashion with respect to the dressing and undressing of the anatomically correct dolls. She gave numerous directions to Ms. Pepper, who was assisting her with the use of the dolls, as to when the clothing should be on and off, how they should be removed. (Resp. App. at 12-17.)

With respect to Teresa's specific testimony, it is full of contradictions. Teresa began her testimony by stating that her parents had never hurt her. (Resp. App. at 11.) She then indicated that her parents had "touched" her. (Id.) She indicated that her father never touched her (Resp. App. at 12), but later indicated that her father penetrated her with three fingers. (Resp. App. at 16.) She also indicated that she had never touched her father (Resp. App. at 12), but later indicated that she had. (Resp. App. at 15.)

Teresa was very clear in denying other specific allegations of abuse. She testified that her father never put his penis in her mouth (Resp. App. at 13), and that he never gave her a bath. (Resp. App. at 14.) Some of Teresa's most important testimony directly contradicted the statements Dr. Schuh made in connection with Teresa's rectal examination. She specifically stated that she never saw a needle or was stuck with one. (Resp. App. at 13.) She also stated that neither of her parents had ever hurt her in the anal area. (Id.)

James' testimony contains numerous denials of DSS's allegations of sexual abuse. James stated that his parents never rubbed his private parts (Resp. App. at 23), and that his parents never touched him with his pants off. (Id.) James also denied that he ever touched his father when he had his pants off (Resp. App. at 24), or that his mother ever touched him when his pants were off. Further, James denied that his mother or father ever touched him on his hiney. (Id.)

Other parts of James' testimony are contradictory at best. At one point, James stated that he was never injured by a needle (Resp. App. at 25), while later testifying that his father had stuck a needle in his private parts. (Resp. App. at 27.) In addition, DSS presented a drawing that James had made prior to the hearing depicting his father touching him in his private parts. In response to further questioning about this drawing, however, James indicated that "Ms. Thea" had asked him to draw the picture. (Resp. App. at 26).

James was never asked about any statements he allegedly made to employees at MUSC while he was there. It was these alleged statements that began DSS involvement with the children. It was alleged that James, while at MUSC, had accused his father of performing oral sex on him. There were no witnesses at trial, however, that corroborated any such statements made by James. The family court noticed this apparent inconsistency and referred to it in its final order. (Pet. App. at 27A.)

GROUNDS FOR DENYING THE PETITION

I. NO RIGHT TO APPELLATE REVIEW ON THE TRIAL RECORD WAS DENIED TO PETITIONER.

Only by pretending that review by the South Carolina Court of Appeals never occurred can Petitioner advance her first argument. Petitioner seeks relief in the form of "meaningful appellate review . . . in protective custody cases nationwide." (Petition, p. 21.) She got the review she seeks from this Court from the South Carolina Court of Appeals.

The court of appeals accepted briefs from the parties. Oral argument was heard. The court of appeals had before it the entire record as presented by the parties.

Given this full review, Petitioner[3] simply lost the appeal on two of the most fundamental bases known to law: credibility of the witnesses and burden of proof. Neither of these two bases raise constitutional concerns requiring the exercise of this Court's certiorari powers. As stated by the court of appeals:

> The factors leading to the family court's findings that DSS provided insufficient proof of sexual and physical abuse dealt with the credibility of the testimony offered during the lengthy proceedings as well as the failure of DSS to present certain evidence, particularly corroborative physical evidence, to substantiate its allegations.

(Pet. App. at 7A.) As noted by the court of appeals and as illustrated by the competing versions of the testimony set forth in the petition's statement of the case and this response's statement of the case, "[a]though the record reflects much evidence

---

[3] As previously noted, DSS did not appeal.

supporting physical and sexual abuse had the Family Court made such a finding, we find no abuse of discretion warranting . . . reversal of the family court's conclusion that the requisite evidence was lacking." (Pet. App. at 7A.)

Full appellate review was not evaded in this matter as contended by Petitioner. The South Carolina Court of Appeals decided the matter on the record made in the family court. Consequently, there is no conflict, as suggested by the petition, between what actually transpired in this case and this Court's statements, as presented in the petition, in Anderson v. Bessemer City, 470 U.S. 564, 577 (1985), ICC v. Jersey City, 322 U.S. 503 (1944), or Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 294-95 (1974), regarding the need for review on the trial record.

That Petitioner failed to get a second bite at the appellate apple is of no constitutional moment. Under the South Carolina Appellate Court Rules, the granting of a writ of certiorari is an act of "sound judicial discretion." Rule 226(b), SCACR. This mirrors this Court's own statements regarding the "right" to review by writ of certiorari. See Sup. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion"). In this case, the South Carolina Supreme Court received briefs and oral arguments and simply concluded that further review beyond that granted by the court of appeals was inappropriate under the circumstances.

Despite a torrent of rhetoric concerning the rights of children, the petition, at bottom, is really an attack on the factual findings of the family court, affirmed by the court of appeals after full review under accepted standards of review. Under this Court's own rules, "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," granting a writ of certiorari is rarely appropriate. Sup. Ct. R. 10. The petition should be denied in this case.

II. THE MATTER IS MOOT.

The children in this case were returned to their parents immediately following the decision of the family court. Neither DSS nor Petitioner ever moved to stay the order of the family court returning the children to the parents. DSS never appealed at all. The children have lived at home since December 1993.

DSS has since "unfounded" the case. (Resp. App. at 10.) The caseworker in charge of the matter has investigated the home and found it "clean and without any health or safety hazards." Resp. App. at 9.) The caseworker has stated under oath that "the children appear to be comfortable in their surroundings; they seem to have a good relationship with their father and he has praise for the children. They do not appear to be afraid of him." (Resp. App. at 9-10.) The caseworker has concluded that "the minor children are not in threat of harm." (Resp. App. at 10.) The family court has dismissed the case. (Resp. App. at 1-3.)

The absence of a live case or controversy at all stages of the appellate process deprives this Court of subject matter jurisdiction. DeFunis v. Odegaard, 416 U.S. 312 (1974). Here, the children are at home and safe. South Carolina public policy has been achieved. The South Carolina Legislature has provided that "[i]t is the policy of this State to reunite the child with his family in a timely manner, whether or not the child has been placed in the care of the State voluntarily." S.C. Code Ann. § 20-7-20(D) (1985). South Carolina courts consistently apply this legislative mandate to family court matters. In DSS v. Johnson, 394 S.E.2d 721 (S.C. App. 1990), the court recognized the mandate that the goal is to "reunite the child with his family." Id. at 721 n. 1. The court recognized that even in cases where abuse has been shown, DSS is required to establish a plan to bring the family together. The court cited S.C. Code Ann. § 20-7-764 (1985), which states:

> The agency plan shall provide the court with a specific plan as to where the child will be placed, what steps will be taken to return the child home, and what action the agency will take to maintain ties between the parent and child. Whenever possible, the plan must be prepared with the participation of the parents, the child and any other agency or individual that will be required to provide services.

Johnson, 394 S.E.2d at 722 (citing S.C. Code Ann. § 20-7-764 (1985)).[4]

---

[4] The statute has since been amended, but still directs that the treatment plan be oriented to correcting problems in the home "in the shortest possible time in order to expedite the child's return to the home." S.C. Code Ann. § 20-7-764(B)(1)(b) (Supp. 1996).

The policy of the State of South Carolina is to keep families together. That has been achieved, even assuming everything charged by Petitioner is true. Granting the petition at this point would serve no purpose as the South Carolina courts would be compelled to conduct further review with this stated goal and the current condition of the home in mind. The petition should be dismissed as moot.

III. THE ISSUE OF JUDICIAL BIAS WAS NOT PROPERLY RAISED IN THE FAMILY COURT.

Despite claims of bias, Petitioner never raised the issue with the family court. No motion for recusal was ever filed. The trial court was given no opportunity, in the first instance, to address the charge. The issue appeared, for the first time, on appeal before the South Carolina Court of Appeals.

Under state procedural rules, failure to raise the issue of bias or prejudice in the trial court bars appellate review. In Payne v. Holiday Towers, 321 S.E.2d 179, 183 (S.C. 1984), the South Carolina Supreme Court held that appellant's claim that "unspecified rulings during the hearing 'clearly show[ing] that the trial judge was in fact biased' was not presented to the circuit judge and, therefore, is not properly before this court." Id. at 183.

The question of bias was not preserved for review. The petition should be dismissed.

IV. THERE IS NO EVIDENCE OF BIAS WARRANTING REVIEW BY THIS COURT.

The family court applied accepted standards for admitting and weighing infant testimony. Petitioner cites statements in the

family court's orders regarding child memory and contends that the family court's acts of observing and weighing infant testimony, according to the laws established by this state, is an error of law which must be reversed.

South Carolina has consistently recognized the potential unreliability of testimony presented by children of tender years and required special inquiries into the knowledge and credibility of infant witnesses. While a child of tender years is not per se incompetent because of age, special factors must be considered before the child's testimony is considered by the trier of fact. South Carolina DSS v. Doe, 355 S.E.2d 543 (S.C. App. 1987). As noted by the South Carolina Court of Appeals:

> A child's competency to testify depends on showing to the satisfaction of the trial judge that the child is substantially rational and responsive to the questions asked and is sufficiently aware of the moral duty to tell the truth if he lies.
>
> The question of competency of a child witness is to be determined by the trial judge. In making his determination, the judge must rely on his personal observation of the child's demeanor and responses to inquiry on voir dire examination.
>
> The judge has the duty to make an independent judicial determination of competency.

Id. at 547.

The South Carolina legislature has consistently recognized the special concerns associated with child testimony. S.C. Code Ann. § 19-1-180 (Supp. 1994) sets forth a ten-part test to be used when viewing hearsay evidence of a child under the age of twelve:

(1) the child's personal knowledge of the event;

(2) the age and maturity of the child;

(3) certainty that the statement was made, including the credibility of the person testifying about the statement;

(4) any apparent motive the child may have to falsify or distort the event including bias, corruption, or coercion;

(5) whether more than one person heard the statement;

(6) whether the child was suffering pain or distress when making the statement;

(7) the nature and duration of any alleged abuse;

(8) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(9) whether the statement has a ring of verity, has internal consistency or coherence, and uses terminology appropriate to the child's age;

(10) whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

Age is a significant factor in determining the reliability of statements. The legislative mandate requires the court to consider whether the child has been coached, the age of the child, the child's motive, and the circumstances surrounding the statement. Petitioner asks this Court to rule that the family court's recognition of the law regarding the special concerns associated with child testimony was an error of law. Petitioner's assertion that the family court's statement regarding the unreliability of infant testimony is an extrajudicial and improper basis is unfounded. The family court followed the laws of South

Carolina recognizing concern with this type of testimony and supported its findings with evidence presented at trial.

In this case, the children were taken from Respondents on November 23, 1992. (Pet. App. at 9A-12A.) For the next thirteen months, the children were in the care of DSS. The Respondents, in that entire time period, were never permitted to visit with the children alone. (See Pet. App. at 15A-17A.) The children were subjected to extensive counselling with anatomically correct dolls. (Pet. App. at 21A.) None of these sessions was taped. (Id.) Despite the intensive counselling and exclusive control exercised by DSS, the children still gave testimony exonerating their parents. The family court observed the children's testimony, such as that of Teresa, and due to the inconsistencies and repetitious, Pavlovian-like responses to rehearsed cues, found it to contain a degree of unreliability. Accordingly, the family court gave the appropriate weight to such testimony.

This Court, itself, has recognized the concern with the reliability of child testimony in cases of child abuse in Idaho v. Wright, 497 U.S. 805 (1990). In the specific context of a Confrontation Clause challenge to a doctor's testimony regarding incriminating statements of a three-year old child, the Court noted, "that it is possible that '[i]f there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness.'" Id. at 826-27 (quoting State v. Robinson, 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987)). It was precisely this type of coaching and manipulation,

observed in the courtroom, that served as the basis for the family court's findings on the reliability of the children's testimony (Pet. App. at 20A-22A.)

In this case, there was ample evidence from which the family court could determine that the testimony of the children was unreliable, including the contradictions in their testimony and the obviously rehearsed testimony. Such judicial rulings supported by the record "almost never constitute [a] valid basis for a bias or partiality motion." Liteky v. United States, 510 U.S. 540, 555 (1994). Petitioner's reliance on the family court's adverse rulings on the evidence presented by Dr. Shuh (Petitioner at pp. 22-24), is also no basis for a finding of judicial basis. Id.

Similarly, the remark at the end of the order on reconsideration regarding the objectivity of Petitioner, her counsel, and her witnesses is not extra-judicial, but derived from the family court's observation of these people in the courtroom in this case. Once again, the obvious coaching of the daughter in the use of the anatomically correct dolls and the testimony of James that "Ms. Thea" had asked him to draw a picture of his father engaging in sexually abusive behavior serve as a basis for the family court's statement. Because the remark is grounded in the conduct observed by the judge in the courtroom, a finding of bias is unwarranted. Id. at 550-51.

CONCLUSION

For the reasons set forth above, the petition in this case should be denied.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

By: _____

William C. Wood, Jr.
Counsel of Record
1330 Lady Street
Post Office Box 11070 (29211)
Columbia, SC 29201
(803) 799-2000

Robert C. Calamari
Dominic A. Starr
Founders Centre, 2411 Oak Street
Post Office Box 3939 (29578)
Myrtle Beach, SC 29577

Attorneys for Respondents

Columbia, South Carolina

7/10, 1997

Supreme Court, U.S.
FILED
SEP 19 1997
CLERK

No. 97-79

In The

Supreme Court Of The United States

October Term, 1996

IN THE INTEREST OF: THE CHILDREN FOR WHOM SANDRA OVERCASH IS GUARDIAN AD LITEM

Petitioner

v.

MR. DOE AND MRS. DOE

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION AND RESPONDENTS' MOTION TO PROCEED IN *FORMA PAUPERIS*

HELEN L. MCGONIGLE
Attorney at Law
P.O. Box 326
Brookfield, CT 06804-0326
(203) 740-0074

Counsel of Record:
SYLVIA LYNN GILLOTTE
Office of the Governor-
Guardian Ad Litem Division
103 S. Pine St., Suite 204
Spartanburg, SC 29302
(864)542-1861

SEPTEMBER 1997

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF JURISDICTION. 1

THIS CASE IS NOT MOOT. 1

REPLY TO STATEMENT OF THE CASE. 4

REPLY

I. REPLY TO IN FORMA PAUPERIS MOTION. . 5

II. A RIGHT TO APPELLATE REVIEW ON THE TRIAL RECORD WAS DENIED THE CHILDREN. 6

III. THE ISSUE OF JUDICIAL BIAS WARRANTS REVIEW BY THIS COURT. 8

CONCLUSION. 10

TABLE OF AUTHORITIES

Federal Cases:

Berger v United States,
255 U.S. 22 (1921) 10

Doe v Bolton,
410 U.S. 1979 (1973) 3

Griffin v Illinois,
351 U.S. 12 (1956) 8

Gwaltney v Chesapeake Bay Foundation,
484 U.S. 49, 66 (1987) 1

Lassiter v Dept. of Social Services,
452 U.S. 18 (1981) 6

Liteky v United States,
510 U.S. 540, 555 (1994) 10

M.L.B. v S.L.J., U.S., 5,
117 S. Ct. 555 (1997) 6,8

Myatt v Hannigan,
910 F.2d 680 (10th Cir. 1990) 4

Pamela Freyd, et al vs Charles Whitfield,
Civil no. L-96-627 10

Roe v Wade,
410 U.S. 113 (1973) 3

Shall v Martin,
467 U.S. 253 (1984) 3

St. Paul Fire & Marine Ins. Co.v. Barry,
438 U.S. 531, 537 (1978) 1

Super Tire Engineering Co. v McCorkle,
416 U.S. 115, 126 (1974) 3

U.S. Bancorp. Mortg. Co. v Bonner Mall,
513 U.S. 18 (1994) 3

United States v Munsingwear, Inc.,
340 U.S. 36 (1950) 1

Law Review and Notes Articles:

Bowman & Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*.
109 Harvard Law Review 549, 610 (1996) ... 8

68 Temple L. Rev. 249 (1995) 8

Rules:

South Carolina Appellate Court Rule 226(b) .. 7

STATEMENT OF JURISDICTION

I. THIS CASE IS NOT MOOT

As a threshold matter, the Petitioner addresses the Respondents' suggestion of mootness raised at pages 13-15 of their brief in opposition, since mootness implicates the jurisdiction of this court. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978).

The general rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action was initiated. *United States v Munsingwear, Inc.*, 340 U.S. 36 (1950). In seeking to have a case dismissed as moot, the party suggesting mootness bears a heavy burden. *Gwaltney v Chesapeake Bay Foundation*, 484 U.S. 49, 66 (1987). The party claiming mootness must demonstrate that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur". *Id.*

The Respondents appear to argue that because "the children are at home and safe", this case is now moot. The Respondents further rely on proceedings in the family court, specifically a review hearing held on August 7, 1997, which occurred after the filing of the Petitioner's petition for writ of certiorari. See, Resp. App. 1-4. Those family court proceedings occurred on remand from the South Carolina Supreme Court. Pet. App. 3A. The South Carolina Supreme Court's opinion affirmed the Court of Appeals narrowly tailored order of remand "to the family court for further proceedings on the issues of neglect and mental injury", and required a de novo hearing based on the current conditions of the home. Pet. App. 8A. The South Carolina appellate courts did not remand for a de novo hearing on the issues of physical and sexual abuse alleged in the Horry County Department of Social Services ("DSS") initial complaint. Pet. App. 9A-10A.

The proceedings in the family court on remand, if anything, illustrate the obvious system failure which has occurred due to:

(i) the failure of the South Carolina appellate courts to engage in meaningful appellate review; (ii) the DSS's failure to fully investigate the mental status of the children and the reason their mother left the family home[1]; and (iii) the DSS failure to have the children evaluated by a medical or mental health professional in anticipation of the family court proceedings on remand for factual findings on neglect and mental injury. The family court's judicial review order dated September 2, 1997 (Resp. App. 1), relies upon a Complaint of Relief from Custody dated July 29, 1997, with the affidavit of a DSS caseworker attached. (Resp. App. 5-10). Based upon a single, apparently announced visit to the Respondents' home, the caseworker found the home "clean and without any health or safety hazards". (Resp. App. 9). The DSS Relief from Custody Complaint indicates that the children's mother inexplicably left the family home and moved out of state. See, Resp. App. pp. 9 and 5. The affidavit further indicates that the children now reside only with their father, whom the DSS alleged to be the primary perpetrator of physical and sexual abuse. See, Pet. App. pp. 20A, 21A and 10A. Despite the explicit order of the South Carolina Court of Appeals directing a de novo hearing on issues of mental injury and neglect, the DSS failed to have the children evaluated by a mental health professional or medical professional. Resp. App. 2. The DSS also failed to interview the children's mother. Counsel for the children - the Petitioner - was not notified until receipt in the mail of a summons dated July 29, 1997 that the DSS would be filing a Relief of Custody Complaint and that a review hearing was scheduled for August 7, 1997. The Petitioner sought a continuance, which was initially granted until September 18, 1997, and then later reassigned to the earlier date of August 7, 1997. The Petitioner has filed a motion with the family court for reconsideration of the Judicial Review Order of September 2, 1997. A copy of the Petitioner's motion for reconsideration is being filed with the U.S. Supreme Court contemporaneously with the Petitioner's Reply. The details of the proceedings in the family court are more fully set forth in the Motion of Reconsideration.

---

[1] Upon information and belief, the Petitioner has been made aware that there has been a domestic violence call to the Respondents' home within the past 12 months.

Regardless of the outcome of the proceedings in the family court on remand, the federal constitutional issues raised in the petition for writ of certiorari are not moot, as a live and actual controversy exists between the parties . The petition deals with past abuse, not the existence of ongoing abuse or present conditions in the home. This Court should apply the "capable of repetition, yet evading review doctrine" in order to insure that protective custody cases do not remain unreviewable in the South Carolina appellate courts and elsewhere. See, *Shall v Martin*, 467 U.S. 253 (1984). If protective custody cases are unreviewable on appeal due to "staleness", and deemed moot upon remand, erroneous family court decisions will remain unreviewable. This would totally usurp the ability of counsel for the children to create the appropriate legal record in protective custody cases. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced to acquiesce in the judgment (cite omitted). The same is true when mootness results from unilateral action of the party who prevailed below". *U.S. Bancorp. Mortg. Co. v Bonner Mall*, 513 U.S. 18 (1994).

This court had no difficulty in rejecting suggestions of mootness in *Roe v Wade*, 410 U.S. 113 (1973), *Doe v Bolton*, 410 U.S. 1979 (1973) and other cases cited in *Super Tire Engineering Co. v McCorkle*, 416 U.S. 115, 126 (1974). "The important ingredient in these cases was the governmental action directly affecting and continuing to affect, the behavior of citizens in our society". *Id.* The practice of remanding protective custody cases due to staleness is a governmental action which directly affects and continues to affect the behavior of citizens in our society. It condones system failure on the part of the legal system and on the part of child protection agencies, placing children at risk and potentially returning them to abusive homes without meaningful appellate review of their cases.

Moreover, there is no evidence in the record that the three children will not be subjected to future abuse, neglect or mental injury. This case is the third time the Respondents have come to the attention of child protective agencies. The issues at stake are capable of repetition yet evading review, and could reoccur for these

children, as well as other similarly situated children in South Carolina.

REPLY TO STATEMENT OF THE CASE

While dwelling on the contradictions in the children's testimony, the Respondents avoid, for obvious reasons, the more compelling evidence of the vaginal and anal scarring found on the oldest of the two girls, Savannah, and the anal scarring found on Theresa. The children's testimony of physical and sexual abuse, while at times contradictory, which is not at all surprising given the circumstances of testifying in the unfamiliar environment of the courtroom, was corroborated by the testimony of Sarah Elizabeth Shuh, M.D., a licensed medical doctor, board certified in pediatrics. App. 31A. Moreover, inconsistency, incompleteness and recantations in child sexual abuse cases not uncommon. See, *Myatt v Hannigan*, 910 F.2d 680, 685, n.2 (10th Cir. 1990).

Dr. Shuh's examination of both girls on January 15, 1993 yielded abnormal physical findings. App. 32A; 34A-36A. During her vaginal examination of Savannah Herring, Dr. Shuh observed a "small notch representing an old scar in the interior portion of the hymen; a small scar external and posterior to the vaginal opening". App. 36A; 35A. During the rectal exam, Savannah indicated to Dr. Shuh she had "been hurt there before." App. 35A. Dr. Shuh noted a small triangular tag scar more external to the anal opening adjacent to a paler scar which extended into the anal canal which indicated trauma. *Id.* Dr. Shuh opined that: the hymenal scar was consistent with penetration of the hymenal opening into the vaginal canal; the scar "external to the vaginal opening but in the genitalia is compatible with an injury to the superficial tissues which could have been caused by sexual abuse"; and the scar in the anal canal was also compatible with penetration. Dr. Shuh testified on cross-examination that it was not "plausible" that Savannah's rectal scarring could be caused by the administering of Fleet enemas to relieve constipation, as the Respondents attempted to claim. App. 39A. Dr. Shuh also testified that urinary tract infections "could not explain the hymenal scar." App. 39A-40A.

Dr. Shuh's examination of Teresa revealed a small

posterior lateral scar in the anal canal which was "consistent with sexual abuse," corroborating both Teresa's testimony that her father had placed a finger in her "hiney," and her statement made to Dr. Shuh of object penetration. App. 36A-37A. Dr. Shuh also testified that many forms of sexual abuse leave no physical findings such as fondling, oral sex, vaginal finger penetration, and rectal penetration with the use of lubricants. App. 37A-38A.

I. REPLY TO IN FORMA PAUPERIS MOTION

Annexed to their brief in opposition to the Petitioner's Petition for writ of certiorari, the Respondents have filed a motion to proceed *in forma pauperis*. Notably, the Respondents have included in their Appendix a recent affidavit and complaint which indicates that the children's mother inexplicably left the family home and moved out of state to North Carolina. See, Resp. App. pp. 9 and 5. The Affidavit, dated June 10, 1997 and signed by a case worker for the DSS, and Complaint, dated July 29, 1997, further indicate that the children now reside only with their father, who was initially alleged by the DSS to be the primary accused perpetrator of physical and sexual abuse. See, Pet. App. pp. 20A, 21A and 10A. The Respondent father, apparently the children's primary caretaker at the present time, represented to the DSS in June of this year that he is now working outside the home as an electrician.

The Respondents' motion for leave to proceed *in forma pauperis* is unsupported by notarized affidavits or unsworn declarations made under penalties of perjury and as required by Supreme Court Rule 39.1. Rule 39.1, when read with F.R.A.P. form 4, requires the Respondents to set forth by affidavit or by declaration under penalties of perjury the required employment and asset information contained in F.R.A.P. Form 4. Respondents' counsel was neither appointed under the Criminal Justice Act, nor under a federal statute, which would relieve the Respondents of supplying an affidavit or declaration.

The Petitioner is mindful of this Court's holdings in *Lassiter v Dept. of Social Services*, 452 U.S. 18 (1981) and *MLB v SLJ*, 519 U.S. (1996), both of which were termination of parental rights cases. This Court held in *Lassiter*, that under the

circumstances of that case, the Eldridge factors were satisfied, overcoming the presumption against the right to appointed counsel. In *Lassiter*, due process required the appointment of counsel in a termination of parental rights case. Significantly, the DSS in this case did not seek the drastic relief of termination of parental rights as in *Lassiter*; rather the DSS complaint sought only protective custody of the children. After a statutory mandated merits hearing, the family court could have continued temporary protective custody - with or without visitation privileges - or ordered counseling for the parents, or ordered reunification with counseling and/or continued monitoring of the family home. Pet. App. 9A-12A.

The Petitioner has a strong interest in the accuracy of any decision concerning the interests of children and shares an interest in the accuracy of any decision possibly infringing parental interests, when those interest coincide. In addition, the Petitioner shares an interest in the informality of procedures before this Court should the Respondents motion to proceed *in forma pauperis* be granted. It is respectfully requested, however, that the Court direct both Respondents to file either notarized affidavits or unsworn declarations in compliance with Rule 39.1 so the Court may properly evaluate the Respondents' claim of indigency.

II. A RIGHT TO APPELLATE REVIEW ON THE TRIAL RECORD WAS DENIED THE CHILDREN

The Respondents claim that the petition "brushes past the next step in the procedural history of the case" (Resp. brief p.1), meaning the South Carolina Court of Appeals. The Respondents further claim that "only by pretending that review by the South Carolina Court of Appeals never occurred can Petitioner advance her first argument" (Resp. brief p.11). Both contentions are without merit. On the contrary, the petition describes the proceedings before the Court of Appeals at length. See Pet. for Cert. pp. 9-11. Moreover, the Respondents second claim is a nonsequitur. The Petitioner's constitutional claims raised in her first argument, i.e., that the due process and equal protection clauses of the 14th Amendment prohibit appellate courts from remanding protective custody cases on the basis of staleness, could not conceivably have been reviewed by the South Carolina Court of Appeals. It was the

South Carolina Supreme Court which, after granting certiorari, after briefing, and after entertaining oral argument, dismissed the Petitioner's appeal with an opinion. In accordance with South Carolina Appellate Court Rule 226(b), the only two applicable considerations governing certorari review are "where substantial constitutional issues are directly involved" and "where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court". The South Carolina Supreme Court concluded a constitutional issue or federal question was before it. The dismissal was due to the court's presumed "staleness" of the record. The federal constitutional issue raised in the petition concerning the South Carolina Supreme Court's dismissal was not before the Court of Appeals. The Respondents' claims that "full appellate review was not evaded in this matter" and "that Petitioner failed to get a second bite at the appellate apple is of no constitutional moment" (Resp. brief p. 12) are simply incorrect. There has been no appellate review of the South Carolina Supreme Court's order of dismissal for staleness.

In relying upon the discretionary review afforded by writs of certiorari before the South Carolina appellate courts (Resp. Brief p. 12), the Respondents overlook the significance of a key procedural step in the proceedings below. The South Carolina Supreme Court did grant certiorari, invoking its jurisdiction to undertake appellate review. See, Pet. App. p. 1A. While it is true that a state is not required by the Federal Constitution to provide appellate review, a state which does grant appellate review must do so in a manner which does not infringe upon constitutional rights. *M.L.B. v S.L.J.*, 519 U.S. (1996)(slip op., at 6). A state which does grant appellate review, as did the South Carolina Supreme Court, must entertain review in a manner consistent with the Due Process and Equal Protection clauses and protect persons from invidious discrimination. *Griffin v Illinois*, 351 U.S. 12, 18 (1956). Once certiorari was granted by the South Carolina Supreme Court, the children were entitled to full and meaningful appellate review of the record then before the court - not an order of dismissal for staleness. This court granted certiorari review following a dismissal in *Stantosky v Kramer*, 455 U.S. 745 (1982).

The Respondents are incorrect in their claim that the

"petition, at bottom, is really an attack on the factual findings of the family court" (Resp. brief p. 13)[2]. On the contrary, the South Carolina Supreme Court dismissed the Petitioner's appeal on the basis of "staleness", not on the grounds that the allegations of trial error were insufficient. Factual findings and evidence are recited in the petition only in so far as they relate to the federal constitutional issues raised in part II of the Petition concerning the judicial bias claim. Certiorari should be granted by this court to decide whether the South Carolina Supreme Court's order of dismissal due to the staleness of the record is constitutional infirm. See, Pet. App. 1-3A.

III. THE ISSUE OF JUDICIAL BIAS WARRANTS REVIEW BY THIS COURT

The issue of judicial bias first became apparent only after Family Court Judge Bonnoitt rendered his decision. It was too late in the proceedings to request recusal. The Petitioner properly raised the judicial bias issue in the South Carolina Court of Appeal, and at her earliest opportunity.

The Respondents confuse issues of competency with the role of the family court judge in being an impartial arbiter in weighing the evidence and reviewing the sufficiency of the evidence. Resp. Brief pp. 16-17. The competency of the children and admissibility of hearsay statements are not in issue. The Respondents fail to address the obvious bias apparent from prejudicial statements made by the family court judge such as "[t]his court must be cognizant of the inherent unreliability of evidence presented of children this age...". Pet. App. 22A. So

---

[2] The Respondents dwell on trial testimony offered by character witnesses from their church.(Resp. brief p.7). Pedophiles come from all walks of life and are men and women of every social class, occupation and religion. The recent case of former Catholic priest James Porter is a prime example of an upstanding member of the community - a Catholic priest - sexually abusing children in secrecy. Porter abused over 68 children in a 34 year span. Bowman & Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy,* 109 Harvard Law Review 549, 610 (1996); 68 Temple L. Rev. 249, 251, n.17 (1995).

broadly worded, this statement discredits even the most solid physical evidence of sexual abuse, such as a semen sample with a positive DNA match with the perpetrator. The remark categorically discredits all evidence presented of children this age, regardless of the quality. The family court judge attempted to conceal his bias by changing the prejudicial remark on reconsideration from the "evidence presented of children of this age" to "memory evidence presented by children". App. 26A. Nowhere do the defendants address in their brief the deep-seated favoritism and antagonism evidenced by these biased remarks.

In addition, the Respondents, without a direct quote, distort the nature of the most egregious remark made by the family court. The prejudicial remark was: "[t]he most troubling question in this case involves the objectivity of many of those who involve themselves in the child sexual abuse industry". App. 28A. The remark was directed at a generalized "child sexual abuse industry", comprised of child advocates, not the illegal commercial enterprise which sexually exploits children. The Respondents distort the record by improperly projecting the court's generalized prejudicial remark concerning the "child sexual abuse industry" onto the Petitioner in stating "the remark at the end of the order on reconsideration regarding the objectivity of Petitioner, her counsel, and her witnesses is not extra-judicial, but derived from the family court's observations of these people in the courtroom in this case". Resp. brief p. 19. The Respondents' diversionary tactic is unvieled when their brief is read together with the precise words of the family court judge. In actuality, the remark made by the court, on its face, derives from extrajudicial opinions formed by the judge about a fictitious "child sexual abuse industry" existing outside the case and is far more antagonistic than the Respondents' brief would suggest. Indeed the remark falls into the category of the deep-seated bias and antagonism contemplated by this Court in *Liteky v United States*, 510 U.S. 540, 555 (1994). The statement is not wholly unlike the example given in in *Liteky* from *Berger v United States* that German-American "hearts are reeking with disloyalty". *Id.*

The Petitioners concerns regarding the extrajudicial impact of fringe advocacy groups on uninformed family court judges, as described at page 25 of her petition, are not unfounded. A very

recent decision of the United States District Court for the District of Maryland in *Pamela Freyd, et al vs Charles Whitfield*, Civil no. L-96-627, summarizes the intensive media campaign engaged in by one such organization. The False Memory Syndrome Foundation ("FMSF") has been known to broadcast its propaganda widely through its spokespersons in national newspapers and magazines, the Internet, and well-known television and radio news programs. *Id.* Over 247 articles about the FMSF and its founders have been published in national newspapers and magazines such as USA Today, The Washington Post, The Baltimore Sun, The Chicago Tribune, The Los Angeles Times, The Dallas Morning News, Newsweek, Time Magazine, and Psychology Today. The founders of the FMSF have appeared on Frontline, Good Morning America, and National Public Radio. *Id.* Given the very vocal efforts of an organization which advocates the interests of those accused of child sexual abuse and incest, it is probably no coincidence that the Family Court judge adopted the FMSF rhetoric in its opinion by using demeaning catch phrases such as "child sexual abuse industry".

CONCLUSION

The petition for writ of certiorari should be granted.

THE PETITIONER,

SYLVIA LYNN GILLOTTE
Counsel of Record
Office of the Governor
Guardian ad Litem Division
103 S. Pine St., Suite 204
Spartanburg, SC 29302
(864)542-1861

HELEN L. McGONIGLE
Attorney at Law
P.O. Box 326
Brookfield, CT 06804-0326
(203)740-0074